

No. 95-129-CFX  
Status: GRANTED

Title: Exxon Company, U.S.A., et al., Petitioners  
v.  
Sofec, Inc., et al.

Docketed:  
July 24, 1995

Court: United States Court of Appeals for  
the Ninth Circuit

Counsel for petitioner: Hufstedler, Shirley M.

Counsel for respondent: Proudfoot, David W., Lacy, John R.,  
McCartney, James, Starr, Kenneth W.

Entry	Date	Note	Proceedings and Orders
1	Jul 24 1995	G	Petition for writ of certiorari filed.
2	Aug 30 1995		DISTRIBUTED. September 26, 1995 (Page 115)
3	Sep 19 1995	P	Response requested -- JPS. (Due October 20, 1995)
4	Oct 20 1995		Brief of respondents Bridon Fibres & Plastics, Ltd., et al. in opposition filed.
5	Nov 1 1995		REDISTRIBUTED. November 22, 1995 (Page 1)
6	Nov 2 1995	X	Reply brief of petitioners filed.
7	Nov 22 1995		Petition GRANTED. *****
8	Jan 3 1996		Joint appendix filed.
9	Jan 3 1996		Brief of petitioners Exxon Company, U.S.A., et al. filed.
11	Jan 8 1996	G	Motion of Maritime Law Association of the United States for leave to file a brief as amicus curiae filed.
12	Jan 22 1996		Motion of Maritime Law Association of the United States for leave to file a brief as amicus curiae GRANTED.
13	Jan 24 1996		SET FOR ARGUMENT TUESDAY, MARCH 19, 1996. (1ST CASE).
15	Feb 6 1996		CIRCULATED.
14	Feb 7 1996		Brief of respondents Sofec, Inc., et al. filed.
17	Feb 7 1996	X	Brief of respondents Hawaiian Independent Refinery, Inc., et al. filed.
16	Feb 8 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Ninth Circuit.
18	Feb 9 1996		Record filed.
		*	Original record proceedings United States District Court for the District of Hawaii (5 BOXES).
19	Feb 22 1996	D	Motion of respondents for divided argument filed.
20	Feb 27 1996	X	Reply brief of petitioners filed.
21	Mar 4 1996		Motion of respondents for divided argument DENIED.
22	Mar 19 1996		ARGUED.

No. 95-\_\_\_\_

95 129 JUL 24 1995

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In The  
**Supreme Court of the United States**  
October Term, 1995

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EXXON COMPANY, U.S.A.;  
EXXON SHIPPING COMPANY,

*Petitioners,*

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.;  
HAWAIIAN INDEPENDENT REFINERY, INC.;  
PRI MARINE, INC.; PRI INTERNATIONAL, INC.,

*Respondents,*

v.

GRIFFIN WOODHOUSE, GRIFFIN WOODHOUSE, INC.,  
BRIDON FIBRES AND PLASTICS, LTD.,

*Third-Party Respondents.*

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**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

1. After this Court decided *United States v. Reliable Transfer Co., Inc.* may an admiralty court exonerate defendants from all liability to a shipowner for the loss of its tanker when defendants conceded that their breaches of maritime duties imposing strict liability in tort and negligence were causes-in-fact of the vessel's stranding because the court found that the tanker's captain was grossly negligent in navigating the imperiled vessel?

2. After this Court decided *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, may an admiralty court exonerate defendants from all liability to a shipowner for the loss of its tanker after defendants conceded that their breaches of express and implied warranties were causes-in-fact of the vessels' stranding because the tanker captain was grossly negligent in navigating the imperiled vessel?

## PARTIES

The parties are Petitioners/Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A., Respondents/Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc. and Sofec, Inc., and Respondents/Third-Party Respondents Bridon Fibres & Plastics, Ltd. and Griffin Woodhouse, Ltd. Werth Engineering & Marine, Inc., initially a third-party respondent, was dismissed before trial by stipulation of the parties.<sup>1</sup>

<sup>1</sup> Pursuant to Rule 29.1, Petitioners state that the non-wholly owned subsidiaries and affiliates that have issued public shares in Petitioners are as follows: Sea River Maritime, Inc., successor in interest to Exxon Shipping Company, Compania Minera Disputada de las Condes S.A.; Esso Malaysia Berhad; Esso Societe Anonyme Francaise; General Sekiyu, K.K.; Imperial Oil Limited; Les Docks des Petroles d'Ambes; Societe Francaise Exxon Chemical; Tonen Kabushiki Kaisha.

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## OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Exxon Shipping Co. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995). A copy of the Slip Opinion is annexed hereto as Appendix A ("App. A").

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## JURISDICTION

The opinion of the Court of Appeals was filed on April 26, 1995. A timely petition for rehearing was denied by order filed May 24, 1995; a copy of the Order is annexed hereto as Appendix B ("App. B"). The district court's jurisdiction was in admiralty, pursuant to 28 U.S.C. § 1333. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

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## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of . . . property, without due process of law. . . ."

Section 1333 of 28 U.S.C. provides, in pertinent part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

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### STATEMENT OF THE CASE

Petitioners Exxon Shipping Company and Exxon Company, U.S.A. ("Exxon") brought this admiralty action against the owners and operators of an oil refinery and a mooring facility in Oahu, Hawaii (collectively "HIRI" or "HIRI respondents")<sup>2</sup> and against Sofec, Inc. ("Sofec," manufacturer of the defective mooring system that failed) seeking damages for stranding and total constructive loss of Exxon's tanker, the HOUSTON, caused by breach of an express warranty of safe berth, breaches of implied maritime warranties, strict products liability, and negligence. HIRI filed a third party complaint against Bridon Fibre & Plastics, Ltd., Griffin Woodhouse, Ltd., and Werth Engineering & Marine, Inc., manufacturers and suppliers of the "chafe chain" that broke, setting the tanker adrift from HIRI's Single Point Mooring System ("SPM").

The HOUSTON was a 766-foot long tanker, weighing over 72,000 dead weight tons.<sup>3</sup> The tanker's Master was Captain Kevin Coyne.<sup>4</sup> His deck assistants were his chief

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<sup>2</sup> The related corporations are Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc. CR 1.

<sup>3</sup> Unless otherwise indicated by record citations, the recited facts are contained in the district court's Findings of Fact and Conclusions of Law, filed May 20, 1993. A copy of the Findings of Fact and Conclusions of Law is annexed hereto as Appendix D (App. D).

The abbreviations used herein are "ER," Excerpts of Record filed in the Ninth Circuit; "RT," Reporter's Transcript and "CR," Clerk's Record.

<sup>4</sup> After the stranding but before trial, the Captain changed his name from "Dick" to "Coyne."

mate, second mate, and two third mates. Six able-bodied seamen formed the remaining deck complement.

This maritime drama ending with the loss of the tanker, loss of cargo, and injury to a seaman began with a written contract by which Exxon agreed to sell a tanker load of crude oil to the HIRI respondents delivered to HIRI's SPM, located one and a half miles off the Oahu coastline. Title to the crude oil was to pass to HIRI when it entered HIRI's cargo hoses. The contract contained an express warranty of safe berth in Exxon's favor.<sup>5</sup>

*The Defective SPM.* The SPM consisted of a buoy anchored to the seabed, pipelines running from the buoy to shore, a mooring assembly comprised of a bridle attached to the buoy and a mooring hawser and a chafe chain that tethered the tankers to the mooring assembly while cargo was being discharged to HIRI's two 840-foot cargo hoses. The cargo hoses were attached to the buoy by heavy metal spool pieces. When cargo was being discharged, the cargo hoses were affixed to the manifolds of tankers. The cargo hoses discharged the crude oil into chambers in the SPM; the oil was thereafter conveyed to undersea pipelines connected with HIRI's refinery. The

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<sup>5</sup> Exxon's contract with the HIRI respondents contained the following covenant of safe berth: "The terminal shall provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat. However, notwithstanding anything contained in this clause, the terminal shall not be deemed to warrant the safety of public channels, fairways, approaches thereto, anchorages, or other publicly-maintained areas either inside or outside the port area where the vessel may be directed."

Warranties of safe berth are frequently found in marine charters; the HOUSTON was not chartered.

cargo hoses had originally been equipped with safety devices to permit quick release of the hoses in emergency situations, including mooring failures, but the HIRI respondents had removed the safety devices from the cargo hoses and replaced them with twelve heavy bolts to secure the hoses to tankers. (12/9/93 RT 61-64. CR 555; ER 143, 744; 12/8/92 RT 8, 22-23, 34-35, ER 157-58.)

Before giving Exxon their express warranty of safe berth, the HIRI respondents had been warned by their own experts that SPM failures were inevitable and that their cargo hoses (sans safety devices) were dangerous, creating the hazards of grounding and oil spills to every tanker that moored there unless the safety devices on the hoses were replaced and additional adequate safety measures were undertaken. (*Ibid.*)

The SPM had failed twice before the HIRI respondents gave Exxon their warranty of safe berth, and they therefore knew that the berth was dangerous when they warranted its safety. They disregarded their experts' advice and undertook none of the recommended safety measures. (*Ibid.*) All of the perils against which they had been warned were visited upon the HOUSTON, her hapless captain and her crew when the SPM failed: The chain tethering the tanker to the SPM broke, both cargo hoses broke, and the tanker was set adrift burdened by the full 840-foot length of one of the cargo hoses bolted to the manifold and the second hose which broke near the water line. HIRI had no tugs with sufficient power to help the

stricken tanker. Moreover, HIRI's mooring masters had not been trained to manage tankers in such emergencies.<sup>6</sup>

*The Pretrial Order Bifurcating Liability.* The respondents moved the district court to bifurcate liability by first trying only the conduct of the HOUSTON's captain after the SPM, its equipment and the cargo hoses had all failed. They argued that if the court found that the Captain's navigation of the crippled tanker was negligent, the case could probably be settled and further discovery avoided. (CR 427, 7/27/92 RT 6.) To persuade the court to grant their motion, respondents conceded that their breaches of admiralty duties were causes-in-fact of the tanker's grounding. They argued that by trying only Captain Coyne's conduct, the whole case could go away because the court could find that Captain Coyne was negligent and that his negligence was a superseding cause of the stranding. (*Ibid.*) Exxon vigorously opposed the motion. It explained that the liability issues were not severable, that trying the Captain's conduct before Exxon was permitted to put on its liability case-in-chief would hopelessly distort causation and all other aspects of legal liability and that bifurcation would prevent the court from determining comparative fault as required by *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975) (hereafter "*Reliable Transfer*"). (CT 427, 7/27/92; RT 24; CR 369.) The court granted respondents' bifurcation motion by order filed July 31, 1992. A copy of the order is annexed hereto as Appendix E ("App. E").

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<sup>6</sup> After the loss of the HOUSTON, the Coast Guard required the HIRI respondents to undertake the safety measures they had earlier ignored. 2/25/93 RT 170-73; Exs. 322, 331, 332.



Exxon moved for partial summary judgment on the ground that the dangerous condition of the SPM, the chafe chain and the cargo hoses violated the HIRI respondents' express warranty of safe berth and breached all of the respondents' implied admiralty warranties. (CR 433, ER 49-50.) The court denied the motion on the ground that its bifurcation order prevented its considering anything in Phase I of the trial that occurred before the second cargo hose broke (called "the breakout"), but the court said that it would consider additional breaches of warranty if any occurred after the tanker was adrift. (CR 538, ER 132.) The court said that it would decide whether the Captain's negligence was "an overriding" cause of the stranding at the end of Phase I and that "[y]ou are really going to confine it to those few minutes - as he gets out towards the last few minutes before the grounding." (2/9/93 RT 50.)

*Exxon's Offer of Proof.* After Exxon had failed to dissuade the court from bifurcation, it offered to prove that the HIRI respondents knew that the berth was unsafe before the tanker sailed to Hawaii, that HIRI's own experts had advised them that a breakaway was inevitable, that removal of and failure to replace the safety devices on the cargo hoses made them very hazardous to every tanker at the SPM, that powerful tugs were needed to prevent groundings when the equipment failed, and that respondents ignored all those warnings, installed none of the safety devices and took none of the other measures that had been recommended to make the berth safe. (2/9/93 RT 61-64, CR 544; ER 143, 744; 12/8/92 RT 8, 22-23, 34-35, ER 157-58.)

Exxon also offered to prove that Sofec had failed to order the proper chafe chain, failed to test it, and failed to

provide adequate instructions regarding operating parameters. As against Bridon and Griffin, it offered to prove that those parties manufactured or supplied the defective chafe chain which had been poorly designed and inadequately tested. (2/9/93 RT 61-64.)

*Trial.* The district court foreclosed Exxon from ever offering any evidence on its case-in-chief. It was not permitted to prove any breaches of the duties that respondents owed to it before the breakout, the risks of loss that those duties imposed upon them, or the admiralty policies laid down by this Court for allocating the risks for such breaches of admiralty duties and contracts. The court also excluded the judgment of the Administrative Law Judge of the Department of Transportation that had exonerated Captain Coyne from any negligence in the stranding. (ER at 293; 2/9/93 RT 40-42.)

At the end of Phase I of the liability trial, the district court entered judgment for respondents holding that none of them had any liability for the loss of Exxon's tanker because Captain Coyne's navigation of the crippled tanker was the superseding cause of the stranding. A copy of the Judgment in a civil case filed April 20, 1994 is annexed hereto as Appendix C ("App. C").

*Brief Summary of the Evidence.* The HOUSTON moored at the SPM on March 1, 1989. On March 2, 1989, while the tanker was discharging oil into HIRI's cargo hoses, a heavy storm arrived and with it high waves and severe ocean currents moving toward shore. At 1715 (5:15 p.m. Honolulu time), the chafe chain broke and set the tanker adrift. Captain Coyne was unable to keep the tanker close to the SPM, and the drifting tanker put tension on the cargo hoses. At 1725, the first cargo hose broke near the



water line. At 1728, the second huge cargo hose broke away from the buoy bringing with it the heavy metal spool piece that had secured the hose to the SPM (the "breakout"). The HOUSTON's crew stopped crude oil from entering the cargo hoses when the chafe chain broke, thereby then limiting the oil spill to the oil in the cargo hoses.

From the time of the breakout until minutes before the tanker stranded, the vessel was crippled by 840 feet of trailing cargo hose that, together with the spool piece, weighed 1700 pounds and severely restricted the tanker's navigability. The spool piece caused a portion of the hose to sink while the remainder was partially floating and partially submerged. The hose repeatedly began moving under the tanker threatening to entangle her propeller or rudder. That danger would have been significantly increased if the tanker had been navigated either forward or turned. If the propeller or rudder were fouled, she would have been helpless. Captain Coyne ordered the tanker to back, although she was not designed to transit by backing and backing the tanker was ponderously slow and difficult.

The HIRI respondents had no tugs with enough power to assist distressed tankers when their SPM failed, and they knew that any help from the Coast Guard was hours away. When the second hose broke, HIRI had available only one small tug, the NENE, which was directed to secure a line to the hose to try to prevent it from fouling the rudder or the propeller.

In the hours after the NENE's crew succeeded in getting a line on the cargo hose, the HOUSTON was in constant peril from the cargo hose while the crews of the

tanker and the NENE were battling the hose, the storm, the high seas, the adverse ocean currents, darkness and casualties.<sup>7</sup> Captain Coyne earlier tried unsuccessfully to anchor the HOUSTON near the SPM; by 1830, however, he had succeeded in backing the HOUSTON a little more than a mile away from the SPM. The HOUSTON there made a lee for the NENE to avoid her being swamped by the heavy seas and to steady the hose's movements as the NENE's crew tried to hold the hose away from the tanker while the HIRI's mooring master and members of the tanker's crew were removing the bolts from the cargo hose before it could be lowered to the sea by the port crane and thereafter towed away from the tanker.

Removal of the bolts consumed more than an hour. At 1927, while the cargo hose was suspended from the ship's starboard crane and before the crane could lower the hose to the sea, efforts to synchronize the movements of the NENE with the tanker failed in the storm. The NENE began moving away from the HOUSTON. (2/17 RT 221-22.) The NENE's movement exerted so much tension on the cargo hose that it caused the crane to topple. The crane operator was thrown to the cage railing of the operator's platform, and the boom of the collapsed crane began sweeping the tanker's deck threatening the lives of the deck crew and creating the danger of its striking the

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<sup>7</sup> The Court of Appeals' opinion states that "[b]y 1803, the small assist vessel Nene was able . . . to get control of the end of the second hose so that it was no longer a threat to the larger ship." App. A. The record shows that the hose was a continuing threat to the HOUSTON until moments before stranding. The opinion later recognizes that the cargo hose caused the port crane to collapse at approximately 1947 injuring the crane operator. App. A.

tanker's manifold which could have caused a disastrous explosion. (2/18 RT 25-26.) The deck crew worked feverishly to restrain the swinging boom, but before the boom could be fully secured, the tanker stranded at 2006.

When the crane collapsed, Captain Coyne ordered his second mate, the first responder for medical casualties, to leave the bridge to evaluate the crane operator's condition. (2/10 RT 113.) The second mate reported that the crane operator appeared to be going into shock from serious injuries. (2/10 RT 119, 122, 124.) Because the Captain had more medical training than his second mate, he decided that he should try to navigate the tanker as quickly as practicable to the safety of the deep seas where he could leave the bridge to examine the crane operator himself.<sup>8</sup>

At 1956, to avoid the hose being trailed by the NENE on the port side, the location of which was not then visible, the Captain ordered the HOUSTON to make a starboard turn when she was 1.1 miles from the shoreline. If he had ordered the tanker again to back, it would have taken an hour to move her one mile. (2/10 RT 90; 2/10 RT 142; Ex. 253.) The location of the tanker at that time had been computed by parallel radar indexing, rather than by plotting fixes on the very small chart of the area aboard

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<sup>8</sup> Although the Court of Appeals acknowledged that the crane operator was in shock, it later opined that the crane operator "was in fact not seriously injured." App. A. Although it later turned out that the crane operator was not as seriously injured as he appeared to be when first examined, that fact did not change the apparently life-threatening condition of the crane operator at the time Captain Coyne had to make his navigation choices.

the HOUSTON. Exxon had no reason to believe that the tanker would be anywhere near the stranding area before the SPM failed. While she was making her slow turn, the HOUSTON struck an undersea coral pinnacle on which she stranded, resulting in her total constructive loss.<sup>9</sup>

*The District Court's Findings, Conclusions and Judgment.* The district court resolved all the conflicts in the evidence in respondents' favor, including the sharp conflicts in the testimony of Exxon's and respondents' expert witnesses with respect to Captain Coyne's navigation of the stricken tanker. It adhered to its prior rulings excluding all of Exxon's evidence on its case-in-chief, and it concluded that Captain Coyne was extraordinarily negligent in ordering the final turn when he had not ordered fixes to be plotted and was not aware of the undersea coral pinnacle on which the vessel stranded. In reaching its conclusions, the district court also relied on two admiralty presumptions, respectively drawn from *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874) and *The Louisiana*, 70 U.S. (3 Wall.) 164, 18 L.Ed. 85 (1866).<sup>10</sup>

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<sup>9</sup> The evidence was conflicting on the question whether the tanker stranded on a pinnacle shown as a dot on the only available chart of the area or whether the pinnacle was different from the only charted pinnacle. The evidence was also in conflict on the question whether the charted pinnacle could have been seen if fixes had been plotted on the chart because of the small scale of the chart and of the charted pinnacle.

<sup>10</sup> *The Pennsylvania* rule is that when a master of a vessel violates a regulatory duty, he is presumptively at fault. Plotting fixes on a navigation chart is a regulatory duty (33 C.F.R. § 164.11(c)), but that navigation rule is not imposed when the master of a vessel is in perilous circumstances, as the regulations themselves recognize. Both vessels in *The Pennsylvania* were at fault, and the court divided damages equally although



The court denied all of Exxon's post-trial motions and entered partial final judgment against it for loss of the tanker. (CR 661.)

Exxon's appeal from the partial final judgment was dismissed on respondents' motion on the ground that the appeal was premature. (CR 661.) On remand, respondents moved for entry of final judgment on all Exxon's claims for damages caused by the loss of its tanker. (CR 662.) Exxon resisted on the grounds, among others, that final judgment was premature because the court had foreclosed it from introducing evidence in support of its claims for breaches of warranty and for strict liability to which negligence defenses did not apply. (3/14/94 RT 12-13.)

The district court entered judgment for the respondents on all theories of liability, stating that it was sending to the court of appeals the question whether Phase I decided all of Exxon's claims for relief. (3/14/94 RT 19-20; CR 674.) Final judgment was thereupon entered in favor of respondents and against Exxon on April 20, 1994. (App. C.) Exxon filed a timely appeal. (CR 677.)

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the fault of one was presumed and the fault of the other proved. *Id.*, 86 U.S. at 138.

In *The Louisiana*, the Court decided that a moving vessel is deemed to be at fault when she strikes a stationary vessel or a fixed structure.

Nothing in either case suggests that the presumed fault is more than ordinary negligence. Here defense experts opined that the Captain made navigational mistakes; apparently the court concluded that several misjudgments and presumptive fault added up to extraordinary negligence.

*Appeal.* Exxon argued that the bifurcation order, the trial orders pursuant thereto, and the ultimate judgment deprived it of procedural due process of law because admiralty does not permit either liability for breach of warranty or for tort to be determined by confining the trial solely to the conduct of the plaintiff when the defendants' misconduct is a substantial factor in causing injury. Exxon also contended that negligence of the plaintiff is not a defense to liability for breach of express or implied admiralty warranties; it is relevant only to the assessment of damages – an issue never tried below. *E.g. Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company*, 376 U.S. 315, 321, 84 S. Ct. 748, 11 L.Ed.2d 732 (1964) ("*Italia Societa*").

Neither strict liability in tort nor negligence could be decided by trying only the conduct of Captain Coyne. In tort cases, this Court requires maritime losses to be apportioned by comparing degree of the parties' faults. *Reliable Transfer*, 421 U.S. at 405, n.11. (negligence). Admiralty policy is to place the risks of loss on the persons best situated to prevent injuries. *Italia Societa*, 376 U.S. at 324 (warranty). The persons who are best situated in this case to reduce the likelihood of injury to or loss of tankers, injury to seamen and environmental pollution were these respondents, not shipowners or the unfortunate captains whose tankers were imperiled by respondents' dangerous equipment.

Exxon also argued that this Court has not written superseding cause into general maritime law and that the doctrine, as applied below, was in conflict with the comparative fault requirement of *Reliable Transfer*, in conflict with the Eleventh Circuit's decision in *Hercules, Inc. v.*

*Stevens Shipping Co.*, 765 F.2d 1069 (1985) (neither common law superseding cause nor last clear chance survived comparative fault established by *Reliable Transfer*), and irreconcilable with liability based on breaches of admiralty warranties, which sound in contract, not tort. Moreover, as Exxon explained, even if the superseding cause doctrine were theoretically applicable in admiralty tort cases, it had no application here because negligence of a plaintiff in response to reasonably foreseeable hazards created by defendants' misconduct never becomes a superseding cause even in common law tort cases. *Restatement (Second) of Torts* § 442B (1965).

*The Ninth Circuit's Opinion.* The lower court affirmed, rejecting all of Exxon's contentions. (App. A.) The court held that the doctrine of superseding cause applies to exonerate admiralty defendants from all liability for breach of warranty, strict liability in tort, and negligence even when defendants have conceded that their acts and omissions were substantial factors in causing the marine casualties. Disregarding Exxon's argument that the doctrine would not apply even in shore-based negligence cases under similar circumstances, the court held that the district court correctly found that the Captain's negligence was the sole legal cause of the stranding and that its interpretation of superseding cause was not in conflict with *Reliable Transfer*. The court disregarded Exxon's contention that negligence of a plaintiff in a breach of warranty case is relevant only to apportionment of damages. (App. A.)

The opinion recognized the conflict among the Eleventh, Ninth, Eighth and Fifth Circuits on the question whether the superseding cause doctrine survived *Reliable*

*Transfer* in maritime tort actions.<sup>11</sup> The court held that the doctrine, as interpreted and applied by it, is a complete defense to actions based on breaches of express and implied admiralty warranties, strict tort liability and negligence, eliminating any need to compare fault. It rejected Exxon's due process attack on the ground that excluding Exxon's evidence on its case-in-chief was within the district court's discretion.

*Petition for Rehearing.* Exxon called the court's attention to important factual errors and misstatements of Exxon's arguments in the opinion.<sup>12</sup> The Petition for

<sup>11</sup> Compare *Hercules Inc.*, 765 F.2d 1069, 1075 (intervening negligence did not survive *Reliable Transfer* with *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992) and *Lone Star Indus. Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1459 (8th Cir. 1991) (disagreeing with the Eleventh Circuit on that point). See also *Hunley v. ACE Maritime Corp.*, 927 F.2d 493, 497, 498 (9th Cir. 1991) (applying superseding cause doctrine in a maritime tort case).

<sup>12</sup> E.g., the opinion states: "Because it maintains the issues of causation, from breakout to grounding are inseverable, Exxon avers that it was unfairly prejudiced by bifurcation. We do not agree." [Emphasis added.] App. A. Instead, Exxon had argued that legal cause of the stranding depended on the nature and extent of respondents' contractual duties and duties of care imposed upon them by admiralty tort law, all of which were breached before the breakout and that the hazards created by those breaches could not be severed from the events thereafter without denying Exxon the fair trial that the Due Process Clause guarantees. *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 51 S. Ct. 513, 75 L.Ed. 1188 (1931) and its spawn.

The opinion also states: "Exxon does not dispute the district court's finding that the defendants met the duty of due diligence in all respects." App. \_\_\_, n.6. The statement is contradicted by the record.



Rehearing was denied without modifying the opinion to correct the misstatements. (App. B.)

### IMPORTANCE OF THE ISSUES PRESENTED

The questions presented are nationally important because uniformity and predictability of admiralty law are vital to national and international merchant shipping, and merchant shipping is a vital part of the Nation's economy. The decision below has especially pernicious impact on American trade with Asia because key ports in trade with the Pacific Rim countries are located in states and territories within the Ninth Circuit's jurisdiction: Alaska, Washington, Oregon, California, Hawaii, Guam and the Trust Territories.

Merchant shippers and their crews have to rely on wharfingers, stevedores, and others to supply them with reasonably safe moorings and facilities over which shipowners have no control. Shipowners take admiralty warranties and the legal duties imposed on such persons very seriously. They also require the assurance of indemnification that admiralty warranties have been previously well understood to provide. Shipowners and seafarers must rely on admiralty warranties and duties being enforced the same way whether their vessels moor in New York, Louisiana, or Hawaii.

Cases within admiralty jurisdiction are controlled exclusively by federal admiralty law. E.g., *East River Steamship Corp. v. Transamerica Delaval*, 476 U.S. 858, 865-66, 106 S. Ct. 2295, 90 L.Ed.2d 858 (1986); *Italia Societa*, 376 U.S. 315, 321, 84 S. Ct. 784, 11 L.Ed.2d 732 (1964); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S.

625, 631, 79 S. Ct. 406, 3 L.Ed.2d 550 (1959). General maritime law has not adopted the harsher rules of common law limiting liability in tort cases. *Kermarec*, 358 U.S. at 631. Strong policy supports uniformity of admiralty law. E.g., *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674-75, 102 S. Ct. 2654, 73 L.Ed.2d 300 (1982); *Kermarec*, 358 U.S. at 631; *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09, 74 S. Ct. 202, 98 L.Ed. 143 (1953).

Only in the Ninth Circuit does the negligence of a vessel's captain exonerate admiralty warrantors from all liability to the shipowner for their breaches of contract. Only in the Ninth Circuit does negligence of a vessel's captain exonerate tortfeasors from all liability for both negligence and strict product liability, even when the losses that occurred were within the hazards created by defendants' breaches of duty and were reasonably foreseeable.

In the guise of applying the common law superseding cause doctrine to Exxon's claims for relief based on tort, the opinion below revives contributory negligence as a complete defense to maritime torts, although this Court discarded that defense over a hundred years ago in *The Max Morris*, 137 U.S. 1, 11 S. Ct. 29, 34 L.Ed. 586 (1890). This Court adopted comparative fault 20 years ago in *Reliable Transfer*. It has not specifically adopted the superseding cause doctrine into general maritime law, nor has the Court yet resolved the conflict among the circuits on the question whether that doctrine has any application after *Reliable Transfer*. The Ninth Circuit has also injected common law superseding cause into the law of admiralty warranties – a confusion of contract with tort principles irreconcilable with this Court's views on contract liability and contrary to other circuits.

# I. THE NINTH CIRCUIT'S DECISION THWARTS THIS COURT'S ADMIRALTY POLICIES

Causation was no longer in issue after respondents conceded that their misdeeds were causes-in-fact of the tanker's loss. Respondents cannot successfully deny that the liability question was whether the risk of stranding was within the risks that the respondents either voluntarily assumed or were required to assume by reason of their warranties and admiralty duties or that stranding was one of the very risks created by the defective equipment furnished to Exxon. This Court's admiralty policy applicable to products liability, as well as the law of negligence, imposes liability on the party best able to take precautions to reduce the likelihood of injury. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 106 S. Ct. 2295, 90 L.Ed.2d 865 (1986) (strict products liability adopted by admiralty law imposes liability on the party best able to protect persons from hazardous equipment); *Reliable Transfer*, 421 U.S. at 405. Even when a warrantor would not be liable in tort for a maritime casualty, he is liable for breach of express and implied admiralty warranties when his breach is a factor in producing injury. Again, admiralty policy is to place the risks of loss on those who are in the best position to reduce the likelihood of injury. *Italia Societa*, 376 U.S. at 320-24.

*Tort Liability.* In *Reliable Transfer* itself, the captain of plaintiff's tanker was grossly negligent, and his negligence intervened after the defendant's negligence; he was 75 percent at fault for the tanker's grounding. His fault reduced ~~the damages~~ for which the Coast Guard was liable, but it did not exonerate the government from liability.

That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all. 421 U.S. at 406, 95 S. Ct. 1708, 44 L.Ed.2d 251, 259.

*Reliable Transfer* was reaffirmed in *City of Milwaukee v. Cement Division, National Gypsum Co.*, \_\_\_ U.S. \_\_\_, 115 S. Ct. 2091, 132 L.Ed.2d 148 (1995). The shipowner brought this admiralty action against the City for the loss of its vessel when it broke away from the City's mooring in a storm and thereafter sank. The shipowner alleged that the City had breached its duty as a wharfinger by assigning the vessel to a berthing slip known to be unsafe in heavy winds and in failing adequately to warn of hidden dangers in the slip. The City claimed that the shipowner was negligent because its master left the ship virtually unmanned in the winter without personnel aboard who could monitor the weather conditions or who could summon help. The district court held that the shipowner was 96 percent at fault for the loss, and it denied the shipowner prejudgment interest. The appellate court modified the judgment by reducing the shipowner's fault to 75 percent, and it awarded prejudgment interest to the shipowner. This Court affirmed. Citing *Reliable Transfer*, the Court required " 'that damages be assessed on the basis of proportionate fault when such an allocation can reasonably be made.' *McDermott, Inc. v. AmClyde*, 511 U.S. \_\_\_, \_\_\_ (1994) (Slip Op'n. at 4)." The Court explained that before the prejudgment interest question could arise, the shipowner's recovery had already been reduced by two-thirds by reason of its own negligence. It added:

The City's responsibility for the remaining one-third is no different than if it had performed the same negligent acts and the owner, instead of



also being negligent, had engaged in heroic maneuvers that avoided two-thirds of the damages. The City is merely required to compensate the owner for the loss for which the City is responsible. *Ibid.*

In our case the HOUSTON's captain and her crew performed heroically to try to rescue the vessel and her seamen from the perils in which respondents' egregious misconduct placed them; but those efforts, in the last minutes, were unsuccessful in saving the ship or preventing injury to the seamen.

The policy reasons for apportioning losses by comparing the degrees of fault of those whose misconduct contributed to the casualty are explicit in *Reliable Transfer*:

It is difficult to imagine any manner in which the divided damages rule would be more likely to "induce care and vigilance" than a comparative negligence rule that also penalizes wrongdoing, but in proportion to measure of fault. A rule that divides damages by degree of fault would seem better designed to induce care than the rule of equally divided damages, because it imposes the strongest deterrent upon the wrongful behavior that is most likely to harm others. *Id.*, 421 U.S. at 405, n.11.

By shifting the entire burden of the loss from respondents to Exxon and disregarding the hazards that respondents created for all tankers that moored at the defective SPM, the Ninth Circuit turned this Court's admiralty policy upside down.

Neither the district court nor the appellate court could compare the degrees of fault of Exxon and the respondents because the bifurcation order and the subsequent orders and judgment entered thereon prevented

Exxon from introducing its evidence that would have established that Captain Coyne's fault was negligible in comparison with respondents' egregious breaches of duty. Even apples cannot be compared with apples with only one apple. The opinion below fails to explain how respondents' admission that their acts and omissions that were causes-in-fact of injury, without more, could permit anyone to determine how respondents' faults could be compared to Captain Coyne's negligence in navigating the distressed tanker.

*Breach of Warranty.* As this Court explained in *Italia Societa*, a shipowner's negligence in tort does not defeat liability for breach of an implied admiralty warranty, a contract action. The Court held a stevedore liable to the shipowner for injury to its seaman caused by a latent defect in equipment furnished by the stevedore, although the stevedore was not negligent.

[L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not. 376 U.S. at 324.

[W]e deal here with a suit for indemnification based upon a maritime contract, governed by federal law [citation omitted] in an area where rather special rules govern the obligations and liability of shipowners prevail, rules that are designed to minimize the hazards encountered by seamen, to compensate seamen for the accidents that inevitably occur, and . . . to minimize the likelihood of such accidents. 376 U.S. at 324.

Neither Exxon nor Captain Coyne had any control over the safety of the mooring or the equipment furnished by respondents that created the hazards of grounding, injuries to seamen and environmental damage with respect to *every* tanker that moored at the SPM. The SPM and allied equipment were groundings waiting to happen before the HOUSTON came to Hawaii. To exonerate respondents from all liability because Captain Coyne was negligent does not make common sense, let alone admiralty sense, because its rule imposes *no* deterrent on respondents' wrongful behavior that was the *most* likely to and did injure others.

*Liability for Breach of Warranty.* As *Italia Societa* pointed out, liability for breach of warranty is based on contract. Negligence of the shipowner, in whose favor the warranty runs, may reduce damages for which the warrantor is liable, but it does not defeat liability. Negligence of the master of a vessel does not relieve the warrantor of safe berth if the berth is, in fact, unsafe. A warrantor of safe berth may "lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damage. . . . [T]his is an issue on which the defendant has the burden." *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173-74 (2d Cir. 1962), *cert. denied*, 372 U.S. 967, 83 S. Ct. 1092, 10 L.Ed.2d 130 (1963).

## II. CONFLICTS AMONG THE CIRCUITS AFTER RELIABLE TRANSFER AND ITALIA SOCIETA ARE NOW RIPE FOR RESOLUTION BY THIS COURT

### A. Circuits are Sharply Divided on Applying Intervening Cause Concepts after Reliable Transfer

The decision below deepens the existing conflict among the circuits over the applicability of common law intervening cause doctrines to admiralty tort liability under general maritime law. In *Hercules, Inc.*, 765 F.2d at 1075, the Eleventh Circuit held that neither last clear chance nor intervening cause survived *Reliable Transfer*; after referring to those two doctrines, the court held:

Under a "proportional fault" system, no justification exists for applying the[se] doctrines . . . unless it can truly be said that one party's negligence did not in any way contribute to the loss, complete apportionment between the negligent parties based on their respective degrees of fault, . . . is the proper method for calculating and awarding damages in maritime cases. 765 F.2d at 1075.

The Fifth Circuit reached the opposite conclusion in *Donaghey v. Ocean Drilling Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992), relying in part on the teaching of *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455 (5th Cir. *en banc*), *cert. denied*, 469 U.S. 832, 105 S. Ct. 120, 83 L.Ed.2d 63 (1984).<sup>13</sup>

<sup>13</sup> *Lone Star Indus. Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1459 (8th Cir. 1991) apparently agrees with the Fifth Circuit that the doctrine of superseding cause survived *Reliable Transfer*.



The Ninth Circuit is in conflict with the Second and Fifth Circuits in concluding that a plaintiff's negligence can become a superseding cause of a marine injury when the injury was within the hazards created by defendants' breaches of duty and were or could have been foreseen by them.

In *Petition of Kinsman Transit Co.*, 338 F.2d 708, 723-26 (2d Cir. 1964), cert. denied sub nom. *Continental Grain Co. v. City of Buffalo*, 380 U.S. 944, 85 S. Ct. 1026, 13 L.Ed.2d 963 (1965), an improperly constructed mooring device owned by the wharfinger, Continental Grain, failed during a heavy storm along a navigable river. That failure caused a ship to break away from the mooring. The owner of the breakaway vessel was negligent in leaving the ship unmanned during a heavy storm. The drifting vessel first severed the mooring lines of a second ship which caused the second ship to drift downstream and to collide with a third vessel. The combined collisions temporarily dammed the river that was clogged by ice. The clogging caused upstream flooding that contributed to the collapse of a city bridge. The wharfinger was not relieved of liability for its fault by the intervening negligence of the master of the first vessel, by the negligence of the bridge operator, or by the intervention of heavy storms and ice. It was required to bear its aliquot share of the damages for the multiple casualties that its own negligence set in motion. As Judge Friendly's lucid opinion for the court explains:

[W]e would find it difficult to understand why one who failed to use the care required to protect others in the light of expectable forces should be exonerated when the very risks that rendered his conduct negligent produced other

and more serious consequences to such persons that were fairly foreseeable when he fell short of what the law demanded. . . . 338 F.2d at 723-724.

The fact that the wharfinger did not have actual knowledge that the failure of the mooring would trigger this chain reaction did not excuse it from all liability. A reasonably prudent man would have foreseen that possibility if he had thought ahead. *Id.*, 338 F.2d at 723. The court rejected the wharfingers' argument that it was saved from liability because the shipowner's master negligently failed to take action that would have avoided the losses, stating that the argument grew out of "the discredited notion that only the last wrongful act can be a cause - a notion as faulty in logic as it is wanting in fairness." *Id.* at 719.<sup>14</sup>

The Fifth Circuit agreed with the Second in *Watz v. Zapata Off-Shore Co.*, 431 F.2d 100, 116 (5th Cir. 1970) in holding that the furnisher of a defective hoist was not relieved of liability because it did not actually foresee the extent of the harm nor the manner in which it occurred because the risk of injury created by a defective weld "encompassed the sort of injury that occurred." 431 F.2d at 116. In that case a shipyard worker aboard a vessel was injured when the load chain of the hoist broke because it was held together by an insufficient weld. Defendants claimed that the defective weld was not the proximate

<sup>14</sup> The opinion below attempted to distinguish *Kinsman* on the ground that the plaintiff's vessel in that case was unmanned, whereas the HOUSTON was manned. (App. A.) That is a distinction without a legal difference because the relevant fact in that case and ours is that the master of the vessel was found negligent.

cause of the accident because the hoist had been subjected to abuse by the owner. The court said that the resolution of the liability issue is " 'determined by asking whether the intervention or the later cause is a significant part of the risk involved in the defendants' conduct or is so reasonably connected with it that the responsibility should not be terminated.' " 431 F.2d at 116 (quoting *Prosser on Torts* § 51, pp. 309-11 (3d ed. 1964)).

Although the opinion below purports to rely on *Restatement (Second) of Torts*, it disregards the sections that apply precisely to this situation. In deciding whether an intervening force defeats or diminishes a defendant's liability after his own negligence has been established as a substantial factor in the injury, the *Restatement* explains that a "hazard" problem, not a "causation" problem, is presented. *Restatement (Second) of Torts*, Section 281 comment h (1965). Section 442B states the applicable black letter principle:

Where the negligent conduct of the actor [respondents] creates or increases the risks of a particular harm [stranding] and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.<sup>15</sup>

<sup>15</sup> "[A]ny harm which is itself foreseeable [as stranding was in this case], as to which the actor has created or increased the recognizable risk, is always 'proximate,' no matter how it is brought about, except where there is such intentionally tortious or criminal intervention, and it is not within the scope of the risk

The stranding of the HOUSTON was within the hazards that respondents' misconduct created. Moreover, masters of vessels imperiled by misconduct of defendants, as well as the forces of the sea and weather, are not required to respond with the imperturbable tranquility of hindsight of expert witnesses who are navigating in a courtroom. Other circuits have consistently recognized that where the master of a vessel is put in the center of destructive forces and he must make hard choices among competing courses, the law requires that there must be something more than mistakes of judgment by the master to find that he was negligent, let alone extraordinarily negligent. *E.g.*, *Employers Ins. of Wausau v. Suwanne River & Spa Lines, Inc.*, 866 F.2d 752, 772 (5th Cir. 1989); *The Gulfstar*, 136 F.2d 461, 465 (3d Cir. 1943); *The Imoan*, 67 F.2d 603, 605 (2d Cir. 1933).

The respondents' serious misconduct was the legal cause of the HOUSTON's loss. Whatever negligence could properly be attributed to Captain Coyne could do nothing more than to reduce the damages for which the respondents were liable.

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created by the original negligent conduct." *Id.*, comment b to § 442B.

*Prosser & Keeton on Torts* § 44 at pp. 301, 305, 312-13, 316 (5th ed. 1984) makes the same points. Determination of liability in negligence cases in which forces other than the defendants' act have intervened, presents a question "of the scope of the defendants' obligation, and far removed from causation." (*Id.* at p. 305.) A defendant is not relieved from legal responsibility for losses because no one could have perceived that a loss would occur in the particular way that it did. (*Id.* at §§ 43, 44, at pp. 298-99, 316.)



### **B. The Circuits are in Conflict on the Impact of Intervening Negligence on Liability for Breach of Admiralty Warranties**

The Ninth Circuit's decision below relieves admiralty warrantors from all liability to the shipowner for breach when its vessel's captain is found grossly negligent. The Second Circuit takes the opposite position with respect to admiralty warranties, following standard principles of contract law. *Paragon Oil Co.*, 310 F.2d at 173-74. *Accord International Ore & Fertilizer Corp. v. S.G.S. Controlled Services, Inc.*, 38 F.3d 1279 (2d Cir. 1994) (plaintiffs' contributory negligence is irrelevant to liability founded on an admiralty contract).

Under the general law of contracts, a defendant who has breached the contract cannot relieve himself of liability because the plaintiff was negligent. The injured plaintiff can recover damages for his loss, excluding those damages that he could have avoided by taking reasonable steps to mitigate his loss. *E.g.*, *Restatement (Second) of Contracts* § 350, pp. 125 *et seq.* (1981). Moreover, if the plaintiff has tried to mitigate damages and has been unsuccessful, he may nevertheless recover the full amount of his loss from the defendant. *Ibid.*

### **III. EXXON WAS DENIED DUE PROCESS BY DISTRICT COURT'S ORDERS PREVENTING IT FROM PROVING LIABILITY**

If not foreclosed by the district court's orders and its ultimate judgment, Exxon would have introduced its evidence establishing respondents' liability for breaches of warranties and torts. Responsibility for the tanker's loss could not be confined to the events that happened after

the breakout; the links in the liability chain were forged by respondents before the tanker ever reached Oahu. The lower courts severed the unseverable by cutting the chain in two. Captain Coyne's response to the hazards that respondents' misconduct created was not a special defense, like the running of limitations, that could be separately tried to defeat liability.

This Court in *Gasoline Products Co., Inc.*, 283 U.S. 494, 500, 51 S. Ct. 513, 75 L.Ed. 1188, stated the basic principle for determining whether a claim or an issue can be separately tried: The issue must be so "distinct and separable from the others that a trial of it alone may be had without injustice."<sup>16</sup>

The question whether Captain Coyne's own conduct was even relevant to causation could not properly be determined without first examining the respondents' acts and admissions in the light of the obligations that they either voluntarily assumed or were required to assume as express and implied warrantors, as wharfingers, or as manufacturers or suppliers of dangerous products that failed in the use for which they were intended. Foreclosing Exxon's proof denied it a fair trial and thereby deprived it of procedural due process of law.

Thanks to the district court's foreclosure orders, the evidentiary record is inadequate on which to compare the degrees of fault of the several actors in the drama or to decide who, among them, was best situated to take the

<sup>16</sup> See also *Smith v. Sperling*, 354 U.S. 91, 95, 77 S. Ct. 1112, 1 L.Ed.2d 1205 (1957) (even when the issue is federal jurisdiction, the issue cannot be tried alone when it is factually interwoven with the merits).

safety precautions that would have prevented the marine casualties that occurred here. The district court was led into constitutional error by the respondents' convincing it that bifurcation would save the court's time. Judicial time could always be saved by preventing plaintiffs from proving their liability cases-in-chief, but the Due Process Clause just says "no" to that shortcut.

### CONCLUSION

Exxon is fully aware that this Court does not sit as an error correcting court. The existing confusion and conflicts among the circuits about the proper application of this Court's admiralty policies to maritime tort and contract cases have seriously impaired the requisite uniformity and predictability of general maritime law. The questions presented in this case are of national, immediate concern because the conflicts have adverse impact on national and international merchant shipping.

Dated: July 21, 1995

Respectfully submitted,

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Admitted to the Bar  
of the Supreme Court  
on January 8, 1962

## APPENDIX A FOR PUBLICATION UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

EXXON COMPANY; EXXON SHIPPING  
COMPANY,

*Plaintiffs-Counter-defendants-  
Third-Party Defendants-  
Appellants,*

v.

SOPEC, INC.,

*Defendant-Counter-claimant-  
Appellee,*

PACIFIC RESOURCES, INC.; HAWAIIAN  
INDEPENDENT REFINERY, INC.; PRI  
MARINE, INC.; PRI INTERNATIONAL,  
INC.,

*Defendants-Cross-claimants-  
Third-Party Plaintiffs-Appellees,*

v.

GRIFFIN WOODHOUSE, Griffin  
Woodhouse, Inc.,

*Third-Party Defendant-Appellee,*

BRIDON FIBRES AND PLASTICS, LTD.,

*Defendant-Third-Party Defendant-  
Appellee.*

No. 94-15806

D.C. No.  
CV-90-0271-HMF

OPINION



Appeal from the United States District Court  
for the District of Hawaii  
Harold M. Fong, Chief District Judge, Presiding

Argued and Submitted  
March 14, 1995 - San Francisco, California

Filed April 26, 1995

Before: William C. Canby, Jr., Charles Wiggins,  
and Thomas G. Nelson, Circuit Judges.

Opinion by T.G. Nelson

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**SUMMARY**

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**Admiralty and Marine/Negligence/  
Civil Litigation and Procedure**

The court of appeals affirmed a district court order. The court held that the district court did not err in finding a captain's extraordinary negligence to be the sole proximate and superseding cause of damage to a vessel that broke away from a mooring system and later ran aground.

The Exxon *Houston*, a tanker belonging to appellants Exxon Shipping Co. and Exxon Company U.S.A. (Collectively, Exxon), broke away from a Single Point Mooring System (SPM) manufactured by appellee Sofec, Inc. and sold by appellee Pacific Resources, Inc. and associated corporations (collectively, HIRI). A storm had caused a break in the chafe chain linking the vessel to the SPM. As the vessel drifted, two oil hoses broke away from the SPM, and one hose interfered with the ship's ability to maneuver.

Immediately after the second hose parted (the "breakaway"), the Coast Guard contacted the *Houston* to see whether it needed assistance. Captain Kevin Coyne refused the offer. During the 2 hours and 4 minutes following the breakout, Coyne took the ship through a series of phases including an attempt to anchor. Coyne failed to plot the ship's position on the chart for a period of time, relying entirely on parallel indexing. For a time, Captain Coyne was alone on the bridge. He proceeded to make a final turn toward shore, which resulted in the ship's stranding. The ship ran aground.

Exxon filed a complaint in admiralty against HIRI and Sofec for the loss of its ship and cargo, and for oil spill cleanup costs. HIRI filed a third-party complaint against appellees Bridon Fibres and Plastics, Ltd. and Griffin Woodhouse, Ltd. Griffin moved to bifurcate the trial, and all defendants joined the motion. The district court granted the motion, limiting the first phase of the trial to the issue of causation with respect to the *Houston's* grounding, leaving the issue of causation with respect to the breakout for Phase Two.

The district court found that Coyne's extraordinary negligence was the sole proximate and superseding cause of the ship's grounding. Following motions by Bridon and Exxon, the court entered a final motion precluding all of Exxon's claims for loss of the vessel. Exxon appealed, contending that the district court improperly bifurcated the proceedings and that the doctrine of superseding cause has not application to cases in admiralty.

[1] In *United States v. Reliable Transfer Co.*, the Supreme Court rejected the rule whereby damages were divided equally between or among negligent vessels regardless of the degree of fault attributable to each. [2] The Ninth Circuit has affirmed the continuing viability of superseding cause in the maritime context. The Ninth Circuit previously held that an intervening force supersedes prior negligence where the subsequent actor's negligence was "extraordinary." [3] Thus, superseding cause may act to cut off liability for antecedent acts of negligence in admiralty cases where the superseding cause is the result of extraordinary negligence. The district court did not "disobey" *Reliable Transfer* in employing the concept of superseding cause in this case.

[4] Exxon was incorrect in arguing that it was unfairly prejudiced by the bifurcation. [5] The district court assumed at the outset of Phase One that the defendants' negligence was a cause in fact of the grounding. [6] Moreover, even if Exxon's theory that the HIRI defendants were strictly liable as warrantors of safe berth was accepted, such a finding would not have rendered erroneous either the district court's bifurcation of the trial or its superseding cause analysis. [7] The district court's decision to bifurcate the trial could not be said to have "severed the unseverable" or to have prejudiced Exxon. Bifurcation of the trial was expeditious and appropriate in light of the circumstances of the case.

[8] Under the rule of *The Louisiana*, when a moving vessel strikes a charted reef, it is presumed the vessel is at fault. [9] *The Pennsylvania* stands for the presumption that when a vessel violates a statutory rule meant to prevent

strandings, the violation was a proximate cause of the stranding. [10] In this case, the *Houston* struck a charted reef because her captain had not bothered to fix her position. Exxon neither rebutted nor offered any compelling reason to ignore the traditional admiralty rules laid out in *The Pennsylvania* and *The Louisiana*.

[11] In addition, the district court did not err in holding Coyne to a reasonable standard of care. [12] The district court's finding that Coyne's failure to take fixes was extraordinarily negligent was supported by the record. [13] The district court's finding that the final starboard turn was extraordinarily negligent was also supported by the record. [14] The district court did not clearly err in finding that Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout.

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#### COUNSEL

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George W. Playdon, Jr., Reinwald, O'Connor, Marrack, Hoskins & Playdon, Honolulu, Hawaii, for defendants-cross-claimants-third-party-plaintiffs-appellees Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc.



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Fibres and Plastics, Ltd.

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### OPINION

T.G. NELSON, Circuit Judge:

### OVERVIEW

Exxon Shipping Co. and Exxon Company U.S.A. (collectively, "Exxon") appeal the district court's judgment following a bench trial in Exxon's admiralty action seeking damages for loss of its tanker, the *Exxon Houston*, and costs of oil spill cleanup and loss of cargo. Exxon maintains that the failure of a Single Point Mooring System ("SPM") manufactured by defendant Sofec and sold by defendants Pacific Resources, Inc. and associated corporations (collectively, "HIRI"<sup>1</sup>) was the actual and proximate cause of its losses. The district court found in Phase One of a bifurcated proceeding that Exxon's negligence superseded any damage caused by the failure of the SPM, and was the sole proximate cause of the *Houston's* stranding. On appeal, Exxon argues that the district court improperly bifurcated the proceedings and that the doctrine of superseding cause has no application to cases in admiralty. We affirm the district court's order.

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<sup>1</sup> We follow the district court's designation of the defendant corporations, which include Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc., as "HIRI."

### FACTS

This case arises from the stranding of the *Exxon Houston* on March 2, 1989, near the Island of Oahu, several hours after it broke away from an SPM owned and operated by defendants HIRI. The *Houston*, a steam propulsion oil tanker weighing over 72,000 dead weight tons, was engaged in delivering oil via two floating hoses into HIRI's submerged pipeline, pursuant to a contract between Exxon and defendant Pacific Resources International, Inc. ("PRII"), when a heavy southern storm (locally termed a Kona storm) caused a break in the chafe chain linking the vessel to the SPM. As the vessel drifted, the two oil hoses broke away from the SPM. Because the hoses were bolted to the ship rather than secured by more readily detachable safety locks, a long (800 feet) length of one hose remained attached to the ship, and interfered with her ability to maneuver.

While the parting of the first hose did not cause a significant threat to the *Houston*, the parting and partial sinking of the second, longer hose, weighed down by a heavy piece of spool torn from the SPM, threatened to foul the ship's propeller. The parting of the second hose at approximately 1728,<sup>2</sup> designated as the "breakout" or "breakaway," is the initiating point in time for events covered in the Phase One trial.

Immediately after the breakout, the Coast Guard contacted the *Houston* to see whether it needed assistance, but because he was advised assistance vessels would not

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<sup>2</sup> The equivalent local time was 5:28 p.m. In keeping with the record, we refer to nautical time in this opinion.



arrive within two hours, Captain Coyne refused the offer, thinking the problem would be resolved within that time. Captain Coyne did not thereafter request assistance from the Coast Guard. During the two hours and forty-one minutes following the breakout, the *Houston's* Captain, Kevin Coyne, took the ship through a series of phases described in some detail in the district court's findings of fact. These phases are summarized in the following paragraphs.

At about 1740, Captain Coyne attempted to anchor, dropping a single anchor which paid out one shot (90 feet) of chain. On the basis of expert testimony, the district court found that Captain Coyne failed to follow standard maritime practice, which would have involved releasing five to six shots of chain to hold the ship under the circumstances. The *Houston* had twelve shots of chain available for each of its two anchors. After this attempt to anchor failed, Captain Coyne made no further efforts to anchor the *Houston* before it stranded, although the district court found there were numerous places en route he could safely have done so.

By 1803, the small assist vessel *Nene* was able, with the assistance of the *Houston*, to get control of the end of the second hose so that it was no longer a threat to the larger ship. Captain Coyne controlled the *Nene's* movements as necessary to coordinate with the *Houston's* movements. Between 1803 and 1830, Captain Coyne maneuvered the *Houston* out to sea and away from shallow water.

Between 1830 and 2009, the time of stranding, the district court found that Captain Coyne made a series of

ill-advised moves. Perhaps most significant was his failure to plot the ship's position on the chart between 1830 and 2004. Rather than plotting fixes of the vessel's position at regular intervals, Captain Coyne relied after 1830 entirely on parallel indexing, a supplemental technique which, according to Exxon's Navigation and Bridge Organization Manual ("Navigation Manual"), "does not relieve the ship's officer of the duty to frequently plot the position of the ship on the chart by means of navigational fixes." Without a fix, Captain Coyne was unable to make effective use of the chart to check for hazards.

Between 1830 and 1947, the crews of the *Houston* and the *Nene* worked to disconnect the second hose from the *Houston*. This was accomplished by 1947. The *Houston's* port crane collapsed in the process, taking the crane operator's seat with it onto the deck. The second mate went below to attend to the crane operator, who was in shock, leaving Captain Coyne alone on the bridge at 1948. Although the Navigational Manual requires that at least two officers be present on the bridge at all times, Captain Coyne did not call upon any of the other available officers to join him until 2000. The district court found that if the bridge had been properly manned, the stranding danger would have been avoided.

Finally, at 1956, Captain Coyne made a disastrous final turn to the right (toward the shore) which resulted in the ship's stranding. Given that the Kona storm was threatening to push the vessel into shore, it is not clear why the Captain chose to turn right instead of continuing to back out safely to sea, or turning to port, away from the coast. Both options were viable. The district court found Captain Coyne's explanations for his decision

unconvincing. Because he had not taken fixes, Captain Coyne apparently was unaware of the ship's position until he ordered Third Mate Spiller to do so at 2004. Third Mate Spiller testified that on seeing the 2004 fix on the chart, Captain Coyne uttered an expletive and immediately ordered an increased speed. Moments later the ship ran aground on a reef near the shore.

#### PROCEDURAL HISTORY

In April, 1990, Exxon filed its complaint in admiralty against HIRI and Sofec (the manufacturer of the SPM) for the loss of its ship and cargo, and for oil spill cleanup costs. HIRI filed a third-party complaint against Bridon Fibres and Plastics, Ltd. ("Bridon"), and Griffin Woodhouse, Ltd. ("Griffin").<sup>3</sup> On June 3, 1992, Griffin moved to bifurcate the trial. All defendants joined the motion. The district court granted the motion on July 31, 1992, limiting the first phase of the trial to the issue of causation with respect to the *Houston's* grounding, leaving the issue of causation with respect to the breakout for Phase Two.

After conducting a bench trial in admiralty between February 9, 1993, and March 3, 1993, the district court found that Captain Coyne's (and by imputation, Exxon's) extraordinary negligence was the sole proximate and superseding cause of the *Houston's* grounding. Exxon filed an appeal on June 16, 1993, which was dismissed for lack of a final judgment. Following motions by Bridon and Exxon, the district court entered a final motion precluding all of Exxon's claims for loss of the vessel on

<sup>3</sup> A third company which was dismissed without prejudice.

April 20, 1994. We have jurisdiction over Exxon's subsequent timely appeal pursuant to 28 U.S.C. § 1291, and we affirm the judgment.

#### ANALYSIS

##### A. *Applicability of superseding cause in admiralty.*

[1] The district court's conclusions of law are reviewed *de novo*. *Havens v. F/T Polar Mist*, 996 F.2d 215, 217, 1994 A.M.C. 605 (9th Cir. 1993). Exxon argues that the Supreme Court's holding in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), replacing the historical divided damages rule in favor of comparative negligence in admiralty cases, vitiates the use of concepts such as intervening force and superseding cause. In *Reliable Transfer*, the Court rejected the rule whereby damages were divided equally between or among negligent vessels (usually in collision cases) regardless of the degree of fault attributable to each. *Id.* at 397, 411. In concluding, the Court stated that:

[W]hen two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only . . . when it is not possible fairly to measure the comparative degree of their fault.

*Id.* at 411.

In the wake of *Reliable Transfer*, the circuits have considered with sometimes conflicting results the issue of



whether superseding cause may still be used to attribute fault in admiralty cases. In *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), on which Exxon relies, the Eleventh Circuit appears to have held the doctrine of superseding cause inapplicable in the maritime context after *Reliable Transfer*. Rejecting appellee's argument that its negligence was not a proximate cause of the accident in question, the *Hercules* court stated:

The doctrines of intervening cause and last clear chance, like those of "major-minor" and "active-passive" negligence, operated in maritime collision cases to ameliorate the . . . so-called "divided damages" rule [rejected by the Supreme Court in *Reliable Transfer*]. . . .

Under a "proportional fault" system, no justification exists for applying the[se] doctrines. . . . Unless it can truly be said that one party's negligence did not in any way contribute to the loss, complete apportionment . . . is the proper method for calculating and awarding damages in maritime cases.

765 F.2d at 1075.

While *Hercules* was understood by the Eighth Circuit to reject the role of superseding cause altogether in maritime cases, *Lone Star Industries, Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1458 (8th Cir. 1991), it is not entirely clear whether in rejecting intervening cause the Eleventh Circuit meant merely to reject "normal intervening cause" as defined by Restatement (Second) of Torts ("Restatement") section 443, or whether it meant also to reject "superseding cause" as defined by Restatement section

440.<sup>4</sup> Given that the *Hercules* court explicitly rules that appellee's underlying actions were a proximate cause (as

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<sup>4</sup> Section 440 of the Restatement (Second) of Torts defines superseding cause as:

an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

Comment b adds:

A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm.

Section 441 defines intervening force as:

one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.

Section 443 on "normal intervening force" states that:

[t]he intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm. . . .

Section 442 lays out factors for determining whether an intervening force is a superseding cause:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;



well as a cause in fact) of the damage, it is plausible that the court would not have ruled out a defense based on superseding cause as the sole proximate cause of the damage.

[2] It is not necessary to resolve here whether the Eleventh Circuit has proscribed the use of superseding cause in admiralty. Several other circuits, most importantly this one, have affirmed the continuing viability of superseding cause in the maritime context. In *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497, 1991 A.M.C. 1217 (9th Cir. 1991), we held that an intervening force supersedes prior negligence where the subsequent actor's negligence was "extraordinary" (defined as "neither normal nor reasonably foreseeable"). Thus, a ship's failure to stand by and offer assistance to the sinking vessel with which it had collided was deemed the sole proximate cause of injury to a rescuing vessel's crewman, even though both of the colliding vessels were causes-in-fact of the collision. *Id.* at 496-97. Accordingly, we held the departing vessel "solely responsible" for the injuries of the seaman aboard the rescuing vessel. *Id.* at 498. See also *Protectus Alpha Navigation Co. v. Northern Pac. Grain Growers*, 767 F.2d 1379, 1384, 1986 A.M.C. 56 (9th Cir. 1985) (indicating in dicta that application of the principle

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(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Restatement (Second) of Torts §§440-42 (1965).

of superseding cause in a maritime case "would not have been improper."); *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455, 466, 1984 A.M.C. 2920 (5th Cir.) (indicating that superseding cause might come into play in admiralty), *cert. denied*, 469 U.S. 832 (1984); *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652, 1994 A.M.C. 512 (5th Cir. 1992) (holding that "the doctrine of superseding negligence in maritime cases . . . retains its vitality"); and *cf. Lone Star*, 927 F.2d at 1458-60 (rejecting the *Hercules* approach and applying superseding cause in a case involving ordinary (as opposed to extraordinary) negligence).

[3] We hereby reaffirm that superseding cause may act to cut off liability for antecedent acts of negligence in admiralty cases where the superseding cause is the result of extraordinary negligence. We therefore hold that the district court did not "disobey" *Reliable Transfer* in employing the concept of superseding cause in this case.

#### B. *The decision to bifurcate.*

The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. *Counts v. Burlington N. R.R.*, 952 F.2d 1136, 1139 (9th Cir. 1991). Rule 42 of the Federal Rules of Civil Procedure provides in pertinent part:

[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, . . . third party claim, or of any separate issue or of any number of claims . . . or issues, always preserving inviolate the right of trial by jury.

[4] Exxon argues that the district court's decision to bifurcate the trial, and to limit Phase One to the issue of causation after the breakout, denied Exxon due process and deprived it of a fair trial by foreclosing it from presenting its case-in-chief. Because it maintains that the issues of causation, from breakout to grounding, are inseverable, Exxon avers that it was unfairly prejudiced by the bifurcation. We do not agree.

[5] The district court assumed at the outset of Phase One that the defendants' negligence was a cause in fact of the grounding. There was thus no need in Phase One for Exxon to establish HIRI's fault in causing the breakout. Rather, Exxon had the burden of proving that the forces set in motion by the breakout were the proximate cause of the grounding. HIRI had the burden of showing by a preponderance of the evidence that Captain Coyne's actions subsequent to the breakout were the sole proximate or superseding cause of the grounding of the vessel, such that the defendant parties were relieved of liability for the *Houston's* loss.<sup>5</sup>

As the district court noted in its order granting the motion to bifurcate, if it did not find Captain Coyne's navigation after the breakout to be the sole proximate or superseding cause of the grounding, it could "still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel." The district court noted, too, that it was "well aware of

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<sup>5</sup> We find Exxon's argument that the district court improperly allocated the burdens of proof to be without merit.

the possibility that the issue of causation with respect to the breakout may still require a second phase of trial, perhaps before a jury." After a lengthy bench trial, the district court found that Captain Coyne's extraordinary negligence was the sole proximate cause of the grounding of the *Houston*, obviating any need to make a comparative analysis of fault regarding the loss of the ship. "The principles of comparative negligence are not applicable when damages can be apportioned to separate causes based on evidence in the record." *Protectus Alpha*, 767 F.2d at 1383.

[6] Exxon also argues that the district court erred in holding that the safe berth clause in the contract between HIRI and Exxon imposed a duty of due diligence rather than one of strict liability upon the defendants.<sup>6</sup> Had the district court applied the strict liability standard, Exxon indirectly avers, it could not have bifurcated the trial or upheld HIRI's superseding cause defense. We find it unnecessary to decide here which standard of care is appropriate in this context; even were we to accept Exxon's theory that the HIRI defendants were strictly liable as warrantors of safe berth, such a finding would not render erroneous either the district court's bifurcation of the trial, or its superseding cause analysis.

Where, as here, the district court finds the injured party to be the superseding or *sole* proximate cause of the damage complained of, it cannot recover from a party whose actions or omissions are deemed to be causes in

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<sup>6</sup> Exxon does not dispute the district court's finding that the defendants met the duty of due diligence in all respects.



fact, but not legal causes of the damage, regardless of whether that party's liability is premised on negligence or strict liability. See Restatement (Second) of Torts § 440 cmt. b (1965) ("superseding cause relieves the actor of liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm"); and see *In re Related Asbestos Cases*, 583 F.Supp. 1142, 1150 (N.D. Cal. 1982) (holding the defense of superseding cause applicable in cases of strict liability in tort.)

[7] Given the viability of the superseding cause doctrine in cases such as this one, the district court's decision to bifurcate the trial cannot be said to have "severed the unseverable" or to have prejudiced Exxon. Because bifurcation of the trial was expeditious and appropriate in light of the circumstances of this case and did not result in prejudice to Exxon, we hold the district court did not abuse its discretion in choosing to take this approach.

C. *The district court's finding of extraordinary negligence.*

A district court's findings of fact are reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a); *Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.), cert. denied, 114 S. Ct. 2125 (1994). This standard applies to findings of fact made by admiralty trial courts. *Havens*, 996 F.2d at 217. "[R]eview under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed." *Concrete Pipe and Prod. of Cal. Inc. v. Construction of Cal., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2280

(1993) (internal quotations omitted); see also *United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991). Special deference is paid to a trial court's credibility findings. *Id.* A district court's findings of negligence, including issues of proximate cause, are reviewed under the clearly erroneous standard. *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991). This standard of review is an exception to the general rule that mixed questions of law and fact are reviewed *de novo*. *Id.* "[D]eterminations of negligence in admiralty cases are findings of fact which will be given application unless clearly erroneous." *Hasbro Industries, Inc. v. M/S St. Constantine*, 705 F.2d 339, 341 (9th Cir.), cert. denied, 464 U.S. 1013, 104 S. Ct. 537 (1983).

Exxon "recognizes the futility of attacking on appeal the district court's finding that Captain Coyne was negligent" because of conflicting expert testimony on that issue, but argues that the district court erred: 1) in finding Captain Coyne's actions to have been extraordinarily negligent; and 2) in finding Captain Coyne's negligence, even if correctly characterized as "gross," to have been the legal cause of the loss.

The district court made detailed findings of fact and conclusions of law after the bench trial. The district court rested its conclusion that Captain Coyne was extraordinarily negligent, and that his negligence was the sole proximate and superseding cause of the ship's grounding, and thus its loss, on its findings that: 1) Exxon had failed to rebut the presumptive admiralty rules of *The Louisiana*, 70 U.S. (3 Wall.) 164 (1865), and *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873); 2) even aside from these presumptions, Captain Coyne acted with extraordinary



negligence; 3) Captain Coyne acted slowly and deliberately and thus cannot have been said to have acted "in extremis;" and 4) Captain Coyne's actions constituted a superseding cause of the ship's loss under Restatement section 442 and the law of this circuit.

[8] Under the rule of *The Louisiana*, when a moving vessel strikes a charted reef, it is presumed the vessel is at fault. 70 U.S. at 173. The vessel may rebut this presumption by showing by a preponderance of the evidence that the collision was the fault of a stationary object, that the moving vessel acted with reasonable care, or that the collision was an unavoidable accident. *Id.*; see *Weyerhaeuser v. Atropos Island*, 777 F.2d 1344, 1347 (9th Cir. 1985). Because the *Houston* struck a charted reef, and because Exxon failed to meet its rebuttal burden, the district court concluded that Captain Coyne's navigation was negligent, and that this negligence was a proximate cause of the stranding.

[9] *The Pennsylvania* stands for the presumption that when a vessel violates a statutory rule meant to prevent strandings, the violation was a proximate cause of the stranding. 86 U.S. at 136. This presumption can be rebutted by a "clear and convincing showing of no proximate cause." *Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 825 (9th Cir. 1988). The district court found that Captain Coyne's failure to plot fixes between 1830 and 2004, and his failure to call another officer to be bridge between 1948 and 2000, while he stood there alone, violated 33 C.F.R. § 164.11 and § 164.11(a). Because Exxon failed to sustain its burden under the rule, the district court found these statutory violations were a proximate cause of the stranding.

[10] Exxon responds to these findings in a footnote, wherein it notes, with respect to the *Pennsylvania* rule, but without offering any support, that there is no duty to plot fixes in a time of peril, and, with respect to the *Louisiana* rule, that "the Ninth Circuit has questioned whether presumption of fault applies when the ship strikes a submerged structure." Exxon cites *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 366 (9th Cir. 1974), in which we "questioned" but did not decide whether the traditional rule would apply in a case where a ship struck a submerged drydock with a hidden recess. *Id.* In the instant case, the *Houston* struck a charted reef because her captain had not bothered to fix her position. The analogy to *Grace Line* is not apt. Exxon neither rebuts nor offers any compelling reason to ignore the traditional admiralty rules laid out in *The Pennsylvania* and *The Louisiana*.

Quite apart from these rules, the district court found that Captain Coyne "acted negligently, unreasonably and in violation of the maritime industry standards" in a number of instances. The court cited his failure to anchor properly, or to make more than one attempt to anchor; his failure to request assistance from the Coast Guard or other available ships; his failure to back the vessel far enough from shore; and his decision instead to linger unnecessarily in the vicinity of shore, only a half mile or so from the actual grounding line.

[11] Because the district court found, partly on the basis of the Captain's own testimony, that Captain Coyne acted with calm deliberation and without the pressure of imminent peril, it held him to the standard of "such reasonable care and maritime skill as prudent navigators employ for the performance of similar service." *Stevens v.*

*The White City*, 285 U.S. 195, 202 (1932). Exxon acknowledges the Captain remained calm, but argues that because the ship was never out of peril, a more lenient standard should have been adopted. Exxon cites no authority on appeal for this proposition. Because the district court's finding that Captain Coyne had ample time in which to reflect and act between 1830 and the time of grounding is well supported by the record, we find that the district court did not err in holding him to a reasonable standard of care.

Finally, the district court found Captain Coyne's negligence not only to be a proximate or legal cause of the stranding, but to be the sole proximate, and thus the superseding, cause of the ship's loss. On the basis of the testimony of the *Houston's* crew and expert witnesses, the district court found that "[a]lthough the breaking of the mooring chain imperilled the ship, the EXXON *Houston* successfully avoided that peril. By 1830, [she] was heading out to sea and in no further danger of stranding." The court recognized from the start that the *Houston's* reaching a point of safety was not by itself enough to break the chain of events set in place by the breakout. Under Restatement sections 442 and 447, as adopted by this Circuit, *Hunley*, 927 F.2d at 497, the Captain's actions after reaching this point of safety would have to be extraordinarily negligent to be deemed a superseding cause cutting off the liability of the defendants. The district court specifically found Captain Coyne's negligence to be extraordinary with respect to the failure to fix and plot the ship's position after 1830, and the decision to make the final starboard turn. The court also found the fact that

the ship grounded almost three hours after the breakout "was highly extraordinary rather than normal."

Exxon argues that the court's findings of extraordinary negligence are erroneous, maintaining that none of the Captain's decisions were outside the range of discretion or "so bizarre" as to be unforeseeable, and that "the only command that lead [sic] the tanker to strand was the [right] turn order." Exxon also argues that it was unnecessary for the Captain to plot fixes because he knew his position by parallel indexing and there would have been no room on the chart to plot fixes. Finally, Exxon argues that the Captain's concern about the injured crane operator made him anxious.

Exxon interprets Captain Coyne's actions as dependent intervening, and thus not superseding, forces under Restatement section 441. Essentially, Exxon argues that all of the Captain's actions were reactions to the breakout, and thus cannot be reviewed independently. Exxon relies on *Kinsman Transit Co.*, 338 F.2d 708, 723-26 (2d Cir. 1964), cert. denied, 380 U.S. 944 (1965), for the proposition that failure to foresee danger will not excuse liability. The case is inapposite. *Kinsman* concerned liability for injuries arising from the drifting of an unmanned vessel after it came unmoored. In the portion of the case cited by Exxon, the court deemed it was foreseeable that an unmanned ship turned loose by a faulty mooring device would come to harm or collide with other vessels. *Id.* The *Houston* was not an unmanned vessel, but one fully manned by and



directed by a captain who was capable of getting her to safety before grounding her by his own acts.<sup>7</sup>

[12] The district court's findings that Captain Coyne's failure to take fixes was extraordinarily negligent is supported by the record. All of the expert witnesses, including Exxon's, testified that it was imprudent and contrary to industry standards for Captain Coyne not to plot fixes after 1830. The record does not support Exxon's contention that plotting fixes would have obliterated the chart. Captain Coyne made no such claim; he explained that he did not plot fixes because he felt it was unnecessary to do so. He believed that he could adequately assess the ship's position through parallel indexing. Exxon's assertion that parallel indexing was sufficient is also contradicted by all of the witnesses, including Exxon's. Captain Coyne's sole reliance on parallel indexing was, moreover, contrary to Navigation Safety Regulations, 33 C.F.R. § 164.11, and to Exxon's own Navigation Manual.

[13] The district court's finding that the final starboard turn was extraordinarily negligent is also supported by the record. Captain Coyne stated that he wanted to get away from shore, but the turn right took him toward shore. As for his concern with the hose and

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<sup>7</sup> *Kinsman* rejects the doctrine of last clear chance under which the trial court had excused the moorers (and the shipowner) from liability. 338 F.2d at 719. While Exxon has analogized superseding cause doctrine to last clear chance, that argument fails, and *Kinsman* does not rescue it. HIRI was not absolved of fault because Exxon had the "last clear chance" to avoid danger, but because the district court found that Exxon's independent and extraordinarily negligent actions were the sole legal cause of the stranding.

danger of collision with the *Nene*, it is undisputed that Captain Coyne made no effort to ascertain the position of the *Nene*. The district court properly rejected the Captain's argument that he could not continue to back up because of his concern for Denton, the injured crane operator, as the man was in fact not seriously injured, no one called upon the Coast Guard or other available ships for assistance in a supposed medical emergency, and the Captain's own testimony that his concerns for Denton did not in fact cause him to do anything he would not otherwise have done.

[14] In sum, the district court found that Captain Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout. Because the district court's findings are well supported by the record, we hold they are not clearly erroneous.

#### CONCLUSION

We hold the district court did not err in finding Captain Coyne's extraordinary negligence to be the sole proximate and superseding cause of the damage to the *Houston*, and we

AFFIRM.

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**APPENDIX B**

NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

EXXON COMPANY, EXXON	)	No. 94-15806
SHIPPING COMPANY,	)	
Plaintiffs/Counter-defendants/	)	D.C. No.
Third-Party Defendants/	)	CV-90-0271-HMF
Appellants,	)	
v.	)	ORDER
SOFEC, INC.,	)	(Filed
Defendant/Counter-	)	May 24, 1995)
claimant/Appellee,	)	
PACIFIC RESOURCES, INC.,	)	
HAWAIIAN INDEPENDENT	)	
REFINERY, INC.; PRI MARINE,	)	
INC.; PRI INTERNATIONAL, INC.,	)	
Defendant/Cross-claim-Third-	)	
Party Plaintiffs/Appellees,	)	
v.	)	
GRIFFIN WOODHOUSE,	)	
Griffin Woodhouse, Inc.,	)	
Third-Party	)	
Defendant/Appellee,	)	
BRIDON FIBRES AND	)	
PLASTICS, LTD.,	)	
Defendant-Third-Party	)	
Defendant/Appellee.	)	

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Before: CANBY, WIGGINS, and T.G. NELSON, Circuit  
Judges.

Appellants' Petition for Rehearing is DENIED.

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## APPENDIX C

## UNITED STATES DISTRICT COURT

## DISTRICT OF HAWAII

EXXON SHIPPING  
COMPANY, et al.,

Plaintiffs,

V.

PACIFIC RESOURCES,  
INC., et al.,

**Defendants.**

## JUDGMENT IN A CIVIL CASE

CASE NUMBER:

90-00271HMF

(Filed Apr. 20, 1994)

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to Fed. R. Civ. P. 54(b), final judgment is hereby entered against plaintiffs on all causes of action stated in their complaint as follows:

A. In favor of all Defendants on Plaintiffs' claim for damages to and loss of the Exxon Houston; and

B. In favor of Defendants Sofec, Inc., Bridon Fibres and Plastics, Ltd., and Griffin Woodhouse, Ltd., on Plaintiffs' claim for recovery of costs of clean-up of the bunker oil spill.

APR 20 1994 /s/ Walter A. Y. H. Chinn  
*Date* *Clerk*

cc:all parties

(By) Deputy Clerk

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY )	CIV. NO.
and EXXON COMPANY, U.S.A. )	90-00271 HMF
(A division of Exxon )	
corporation), )	
Plaintiff, )	
vs. )	
PACIFIC RESOURCES, INC.; )	
HAWAIIAN INDEPENDENT )	
REFINERY, INC.; PRI MARINE, )	
INC.; PRI INTERNATIONAL, )	
INC.; and SOFEC, INC., )	
Defendants. )	
<hr/>	
PACIFIC RESOURCES, INC.; )	
HAWAIIAN INDEPENDENT )	
REFINERY, INC.; PRI MARINE, )	
INC.; PRI INTERNATIONAL, )	
INC., )	
Third-Party Plaintiffs, )	
vs. )	
BRIDON FIBRES AND )	
PLASTICS, LTD.; GRIFFIN )	
WOODHOUSE, LTD., and )	
WERTH ENGINEERING, INC., )	
Third-Party Defendants. )	
<hr/>	

[FINDINGS OF  
FACT AND  
CONCLUSIONS  
OF LAW]FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed May 20, 1993)

On March 2, 1989, the oil tanker EXXON HOUSTON stranded near Barbers Point on the island of Oahu after breaking away from its mooring earlier that day. Between February 9, 1993 and March 3, 1993, the court held a bench trial in this admiralty action relating to the stranding. The trial was the first phase ("Phase One") of a bifurcated proceeding, and was limited to events occurring after the EXXON HOUSTON broke away from its mooring.

The court makes the following findings of fact and conclusions of law. To the extent that any findings of fact herein are more properly construed as conclusions of law, they shall be so construed; and to the extent any conclusions of law are more properly construed as findings of fact, they shall be so construed.

FINDINGS OF FACTA. Parties

1. Plaintiff Exxon Shipping Company was the owner and operator of the EXXON HOUSTON, an oil tanker. Exxon Shipping Company vessels carry petroleum products for Plaintiff Exxon Company, U.S.A. This order will refer to the Plaintiffs collectively as Exxon.

2. Defendants and Third-party Plaintiffs Pacific Resources, Inc., PRI International, Inc., and Hawaiian Independent Refinery, Inc. are affiliated corporations. These corporations trade in oil and operate the single point mooring and refinery at Barbers Point.



3. Defendant Sofec, Inc. manufactured the single point mooring at Barbers Point.

4. Third-party Defendant Griffin Woodhouse, Ltd. manufactured the chafe chain which held ships to the single point mooring.

5. Third-party Defendant Bridon Fibres and Plastics, Ltd. distributed the chafe chain.

6. Third-party Defendant Werth Engineering, Inc. was dismissed from this action before the trial. This order will refer to the Defendants and Third-party Defendants collectively as the Defendants.

#### B. Contractual Arrangements

7. Plaintiff Exxon Company, U.S.A., a division of Exxon Corporation, and Defendant PRI International, Inc., ("PRII") entered into a buy/sell arrangement in 1988, pursuant to which Exxon Company, U.S.A. delivered Alaska North Slope crude oil to PRII and PRII delivered West Texas Intermediate crude oil to Exxon Company U.S.A.

8. Among the terms of the agreement was a paragraph entitled "Safe Berth Availability" which provided, in relevant part:

The terminal shall provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat. However, notwithstanding anything contained in this clause, the terminal shall not be deemed to warrant the safety of public channels, fairways, approaches thereto, anchorages, or other

publicly-maintained areas either inside or outside the port area where the vessel may be directed.

9. On April 4, 1988, at PRII's request, Exxon U.S.A. agreed that the above quoted provision "includes 'single point mooring' ". The provision, as amended, was in effect on March 2, 1989.

10. On June 7, 1988, Exxon U.S.A. agreed to deliver crude oil "by vessel into Hawaiian Independent Refinery, Ewa Beach, Hawaii via offshore single point system, or upon request by PRI vessel into a West Coast refinery or terminal acceptable to Exxon."

11. On March 1, 1989, pursuant to the above contract, the EXXON HOUSTON arrived at the single point mooring (SPM) at Barbers Point, Oahu. The SPM is owned and operated by Defendant Hawaiian Independent Refinery, Inc. (HIRI), an affiliate of PRII.

#### C. Arrival Of The EXXON HOUSTON At HIRI's SPM

12. At all times relevant to Phase One trial, the EXXON HOUSTON was a single screw, steam propulsion oil tanker, 72,056 dead weight tons and 766.9 feet in length, with shaft horsepower of 19,000 ahead, and approximately 6,000 astern.

13. At all times relevant to Phase One trial, the EXXON HOUSTON was equipped with two forward anchors, mounted on the port and starboard bows respectively, and another anchor astern. The forward anchors carried with them 1,080 feet of anchor chain.

14. At all times relevant to Phase One trial, Kevin Dick was the Master of the EXXON HOUSTON. Kevin Dick has changed his name to Kevin Coyne, and these findings of fact will refer to him as Captain Coyne. Captain Coyne was an employee of Exxon Shipping Company and was acting within the course and scope of his duties throughout the events leading up to the stranding.

15. Previous visits in Exxon tankers had familiarized Captain Coyne with HIRI's single point mooring at Barbers Point. At these earlier visits, HIRI mooring masters had briefed Captain Coyne on the conditions at the SPM. This briefing included information about the unpredictability of currents at the SPM.

16. On March 1, 1989, the EXXON HOUSTON arrived at HIRI's SPM. Captain Stephen Kuntz, a mooring master provided by HIRI, boarded the EXXON HOUSTON and oversaw the mooring of the vessel to the SPM.

17. Before allowing the vessel to moor at the SPM, Captain Kuntz presented to Captain Coyne a document entitled General Instructions, Discharging/Loading Orders and Indemnification, dated March 1, 1989, which Captain Coyne signed.

18. On March 2, 1989, the EXXON HOUSTON was manned by the following officers (other than Captain Coyne) who were employed by Exxon Shipping Company:

<u>Name</u>	<u>Position</u>
Duane Madinger	Chief Mate
Hallock Davis	Second Mate
Raymond Spiller	Third Mate
Richard Spear	Third Mate

All were acting within the course and scope of their duties that day.

19. Third Mate Spear had been relieved by Third Mate Spiller on March 1, 1989, but remained on board through March 2, 1989 as an extra man per Captain Coyne's instructions.

20. On March 2, 1989, Marie Huhnke, a licensed third mate, was employed by Exxon Shipping Company on board the EXXON HOUSTON as an able-bodied seaman (AB).

21. On March 2, 1989, Captain Steven Marvin relieved Captain Kuntz as mooring master and was on board the EXXON HOUSTON at all times relevant to Phase One trial.

22. Captain Marvin was a competent and experienced mooring master by virtue of his naval background, his training as a mooring master, and his 8 years of experience as a HIRI mooring master. Captain Marvin did not have a master's license nor experience aboard commercial tankers as master or first mate. These were HIRI requirements for mooring masters which were instituted after Captain Marvin had begun serving as a mooring master. The court finds Captain Marvin's failure to meet

these requirements to be irrelevant in light of his experience and training and not a cause of the incident on March 2, 1989.

23. On March 2, 1989, the EXXON HOUSTON was moored to HIRI's SPM and discharging oil into HIRI's submerged pipeline. The discharge required two floating hoses, each approximately 840 feet in length, which ran from the port manifold of the EXXON HOUSTON to the SPM. Each hose was secured to the ship's manifold by twelve bolts and several restraining lines.

24. A mooring assembly including a chafe chain and mooring hawser attached the bow of the EXXON HOUSTON to the SPM. During normal operations at the SPM, the mooring assembly held the ship in place and allowed the hoses to float freely without any tension.

#### D. The Breakout

25. On March 2, 1989, while the EXXON HOUSTON was discharging oil at the SPM, there was a heavy storm with winds and seas coming generally from the south (a Kona storm). At 1715,<sup>1</sup> the storm caused a link in the chafe chain to part. The ship began to drift away from the SPM, putting the hoses under tension.

26. Despite an attempt to keep the ship near the SPM, the hoses parted. The first hose parted close to the water line of the vessel beneath the port manifold of the

<sup>1</sup> In conformance with the trial testimony, all times in these findings are given in Honolulu local time in military format. Thus, 5:15 p.m. Honolulu time is written as 1715.

EXXON HOUSTON at 1725. Because only a short portion of this hose was left attached to the ship, it was not a threat to the ship's subsequent handling.

27. The second hose parted at approximately 1728 on March 2, 1989. This is the point which has been designated as the "breakout" and is the initiating point in time for the Phase One trial.

28. The second hose tore a heavy metal spool piece off the SPM, leaving approximately 840 feet of that hose connected to the ship's port manifold. Approximately 100 feet at the end of the hose sank due to the weight of the spool piece. The remainder of the hose continued to float. (Any further references to "the hose" refer to this second, longer hose.)

29. The hose was long enough to reach the ship's propeller from the port manifold. Captain Coyne was justifiably concerned that the hose would foul the propeller if the ship went forward.

30. A small line handling boat, the NENE, was at the SPM to assist the EXXON HOUSTON when the breakout occurred. The NENE was too small to push or tow the EXXON HOUSTON to safety after the breakout.

31. At 1728, the EXXON HOUSTON's draft was 15 feet forward and 30 feet aft. This left an unusually large portion of the EXXON HOUSTON's bow above the water, making the vessel more difficult to turn in the wind.

32. During the period between 1728 and 2009, the bridge of the EXXON HOUSTON was manned by an able-bodied seaman acting as the helmsman, and the



following vessel's officers and the mooring master as shown below:

- A. From 1728 until 1830:  
Captain Coyne  
Captain Marvin  
Second Mate Davis
- B. From 1830 until 1948:  
Captain Coyne  
Second Mate Davis
- C. From 1948 until 2000:  
Captain Coyne
- D. From 2000 until 2009:  
Captain Coyne  
Third Mate Spiller

33. Two vessels had broken away from HIRI's SPM on previous occasions. In one case the vessel was successfully remoored to the SPM, while in the other case the vessel's master kept the vessel's head to the SPM while the oil hoses were disconnected.

34. At 1730, the U.S. Coast Guard Joint Rescue Coordination Center initiated a radio call to the EXXON HOUSTON asking if assistance was needed. The Coast Guard told Captain Coyne that assistance vessels would take more than two hours to arrive. Captain Coyne refused the offer of assistance, believing that the situation would be resolved within that time.

E. Attempt To Anchor

35. At approximately 1740, Captain Coyne dropped his forward starboard anchor which paid out one shot (15

fathoms/90 feet) of chain. The depth of water in the area where the anchor was dropped is 10-11 fathoms (60-66 feet).

36. The standard practice in anchoring a ship is to release several additional shots of chain which increase the anchor's holding power. When the anchor stops pulling chain out by itself, the ship deploys the extra chain by either going slightly astern or by pushing chain out with the anchor windlass.

37. One shot of chain could not hold the ship in 10-11 fathoms of water. Five to six shots of chain would have been required to hold the EXXON HOUSTON at its 1740 anchoring position. On the evening of March 2, 1989, the EXXON HOUSTON had on board and available 12 shots (1080 feet) of anchor chain for each of the forward anchors.

38. Captain Coyne neither went astern nor engaged the windlass to deploy the chain. Captain Coyne abandoned the anchoring attempt at 1747 after the chain did not pay out of its own accord.

39. While raising the starboard anchor, the long hose became lodged on the anchor. Captain Coyne then ordered the anchor re-lowered to dislodge the hose from the starboard anchor.

40. Although in retrospect this might have provided an opportunity to keep the hose secured away from the propeller, there was a real possibility that the hose would later free itself and again endanger propulsion. Moreover, the situation presented to Captain Coyne was a novel one, and it was not negligent that Captain Coyne did not

think of exploiting the happenstance snagging of the hose.

41. After Captain Coyne raised the starboard anchor at approximately 1747, he never again attempted to anchor the EXXON HOUSTON prior to the stranding.

42. A review of the track taken by the EXXON HOUSTON between 1747 and 2009 shows numerous areas where the vessel could have safely anchored.

#### F. The Transit

43. By 1803, the NENE had attached a line to the hose and was able to control the end of the hose, keeping it on the EXXON HOUSTON's port side and away from the EXXON HOUSTON's propeller. Captain Coyne ordered the NENE's movements as necessary to coordinate with the EXXON HOUSTON's movements.

44. The EXXON HOUSTON backed out to sea between 1803 and 1830. Its position was plotted on chart # 19362 for times 1740, 1747, 1803, 1820 and 1830. From 1803 to 1830, the EXXON HOUSTON made a course of 260°, proceeding in a generally westerly direction at a speed of 2 knots over ground, on a half astern bell. This course took the EXXON HOUSTON out to sea and away from shallow water.

45. Captain Marvin testified that at 1830, positions for times 1803, 1820, and 1830 were not plotted on the chart. The implication of this testimony is that the three fixes were falsified. Captain Marvin further testified that he had accurately estimated the ship's position at 1830 to

be 800 yards due west of the SPM, a position that conflicts with the plotted 1830 position. The court finds these portions of Captain Marvin's testimony to be not credible in light of the weight of the evidence. The court finds that the 1803, 1820, and 1830 fixes accurately reflect the positions of the EXXON HOUSTON at those times.

#### G. Post-1830 Maneuvers

46. At 1831, Captain Coyne quit transmitting away from the shore and ordered a slow ahead bell. The change of course at 1831 was not caused by any necessity or emergency and there was no reason why the vessel could not have continued to back out to sea after 1830. At 1830, the EXXON HOUSTON was only slightly more than one mile away from the shore, and about a half mile from the grounding line.

47. The EXXON HOUSTON remained from 0.9 to 1.1 miles from shore from 1830 until 1956. Had Captain Coyne so decided he could have continued to back the ship after 1830 to any distance offshore he wanted. Later in the evening, Captain Coyne could have suspended disconnecting the hose at any time and backed another mile to deeper water. Backing further to sea could have been accomplished without significant risk to the EXXON HOUSTON or the NENE, and in fact posed much less risk than remaining near the shore while a Kona storm tended to push the ship ashore.

48. At 1831, Captain Coyne began backing and filling-alternating short ahead and astern bells to maintain a sheltered lee on the port side of the vessel. The lee

allowed the hose to be disconnected with reduced exposure to the wind and seas from the south. The backing and filling caused the ship to stop its progress away from the shore.

#### H. Navigation After 1830

49. Between 1830 and 2004 on the evening of March 2, 1989, a period of one hour and thirty four minutes, no positions of the EXXON HOUSTON were plotted on any chart.

50. At some time between 1830 and 2004, the EXXON HOUSTON moved out of the area charted on chart # 19362. At that point, chart # 19357 should have been used. Chart # 19357 was less detailed than chart # 19362, but was adequate for plotting fixes. Fixes could have been plotted on Chart # 19357 without obliterating either prior fixes or the information on the chart.

51. There are adequate charted aids to navigation in the vicinity of Barbers Point.

52. A prudent mariner would have fixed and plotted his vessel's position at least every 15 to 20 minutes in the situation in which the EXXON HOUSTON found itself after 1830 on March 2, 1989. Many factors existed that day that would have compelled a prudent mariner to fix his position frequently. These factors include, but are not necessarily limited to: the proximity to shore, the rough weather pushing the ship shoreward, the difficulty of estimating the ship's position in the dark, the possibility that removing the hose would be a distraction from

navigation, and the difficulty of maneuvering the EXXON HOUSTON with the hose attached.

53. Frequent plotting of the vessel's position would have enabled Captain Coyne to determine the effects of wind, sea and any currents on the tanker, and would have alerted him that he was approaching danger.

54. Captain Coyne had personnel available for the plotting of fixes but failed to use them. As a requirement of receiving a third mate's license, an individual must pass a Coast Guard examination and demonstrate an ability to take and plot fixes. Each of the officers and AB Huhnke were able to take and plot fixes.

55. Captain Coyne testified that between 1830 and 1956, he navigated by the method of parallel indexing, a technique in which a line is drawn on the radar to show relative movement with respect to an object. Using parallel indexing, Captain Coyne endeavored to keep the EXXON HOUSTON at a distance of 0.9 to 1.1 miles from the shore.

56. Parallel indexing is not a substitute for fixing the position of the vessel. Navigation by parallel indexing without plotted fixes is inherently dangerous and a violation of industry standards.

57. With respect to the technique of parallel indexing, the Exxon Navigation and Bridge Organization Manual specifically states as follows:

Parallel indexing does not relieve the ship's officer of the duty to frequently plot the position of the ship on the chart by means of navigational fixes.



\* \* \*

FAILURE TO FOLLOW THE ABOVE PRECAUTIONS OR TO PROCEED WITHOUT RELIABLE CHARTED FIXES IS DANGEROUS. PARALLEL INDEXING IS A SUPPLEMENTAL NAVIGATIONAL TECHNIQUE ONLY.

Joint Trial Exhibit 250, Appendix G, p. 5 (capitalization in original).

58. Captain Coyne testified at trial that he often ascertained the position of the ship after 1830 even though he failed to plot it on the chart. For the reasons explained below, the court finds this testimony to be not credible.

59. Captain Coyne's trial testimony contradicts his own earlier deposition testimony. Captain Coyne testified at trial that he took bearings to Barbers Point lighthouse after 1830. These bearings and the parallel indexing range taken from the radar supposedly allowed him to ascertain the ship's position. At his deposition on April 3, 1991, however, Captain Coyne testified that he did not remember taking bearings and that he relied on parallel indexing. When asked to explain this discrepancy at the trial, Captain Coyne did not have a plausible explanation.

60. Captain Coyne also testified at trial that he and Second Officer Davis frequently cross-checked their parallel indexing and that both understood the ship's navigational situation. This situation, as described by Captain Coyne and confirmed by the ship's ultimate stranding position, was that the EXXON HOUSTON rounded Barbers Point and moved northward along Oahu's west shore. In order to monitor this progress, Captain Coyne

would have needed to use chart # 19357. In contrast, Second Officer Davis testified in his deposition that he believed the ship had remained near its 1830 position in the area charted on chart # 19362. He further testified that chart # 19357 was not used while he was on the bridge. Second Officer Davis' account shows that he did not know the true position of the ship, and casts further doubt on Captain Coyne's assertion that Second Officer Davis and Captain Coyne cross-checked their positions.

61. The conflicting testimony is not the only evidence that Captain Coyne did not know the position of the EXXON HOUSTON after 1830. As discussed in more detail below, at 1956 Captain Coyne ordered a right turn that took the EXXON HOUSTON directly onto a charted reef. The most plausible explanation for that turn is that Captain Coyne did not know the EXXON HOUSTON's position when he started that turn.

62. Thus, the court finds that Captain Coyne did not take bearings to ascertain the EXXON HOUSTON's position after 1830 on March 2, 1989. From 1830 to 2004, Captain Coyne knew only his range from shore from the parallel indexing plot. This single input did not allow him to fix the ship's position. Without a fix, Captain Coyne was not able to check the chart for hazards.

#### I. Hose Disconnect And Crane Failure

63. At 1830, Captain Marvin left the bridge of the EXXON HOUSTON to assist with disconnecting the hose. Captain Marvin did not return to the bridge again until after the grounding. Captain Coyne did not ask Captain Marvin to return to the bridge at any time after 1830.

64. It took over an hour to disconnect the hose. After the hose was disconnected, the EXXON HOUSTON's port crane was used to lower the hose into the water. While the hose was suspended from the crane, the NENE and the EXXON HOUSTON moved apart, causing the crane to collapse at 1944.

65. The crane's collapse freed the hose, allowing it to drop into the water. At 1947, the NENE pulled the hose clear of the EXXON HOUSTON.

66. As the crane collapsed, it carried the crane operator's seat onto the deck with it. Chief Mate Madinger feared that the crane operator, AB Ike Denton, had been injured. Denton was taken to his quarters.

67. At 1948, Captain Coyne sent Second Mate Davis from the bridge to evaluate AB Denton's condition. Second Mate Davis had received medical training from Exxon Shipping Company, and was the designated "first responder" for medical casualties.

68. Captain Coyne did not replace Second Mate Davis with another officer on the bridge. From approximately 1948 to 2000, Captain Coyne was the only officer on the bridge of the EXXON HOUSTON. That left the bridge inadequately manned, with no other officer to fix the vessel's position.

69. Between 1948 and the time of the stranding, there were additional ship's officers available for duty on the bridge.

70. Exxon Shipping Company's Navigation and Bridge Organization Manual ("Navigation Manual") required that under conditions similar to those present on

the March 2, 1989, at least two ship's officers be present on the bridge at all time.

71. If the bridge had been properly manned, the danger of stranding would have been avoided.

#### J. The Final Turn

72. After evaluating AB Denton, Second Mate Davis reported to Captain Coyne that AB Denton was possibly going into shock, but had no external injuries.

73. Because Captain Coyne had more medical training than Second Mate Davis, Captain Coyne decided that he should personally evaluate AB Denton's condition as soon as possible. In order to accomplish this, Captain Coyne decided to rapidly move the ship away from the coast so that he could allow another officer to relieve him on the bridge.

74. At 1956, Captain Coyne commenced the "final turn," a right turn on a half ahead bell, which he then reduced at 1958 to a slow ahead, and he proceeded to execute the attempted turn on slow ahead bell until 2005.

75. Captain Coyne did not look at the navigational chart before commencing the final turn.

76. At the time when he commenced the final starboard turn, Captain Coyne did not know the ship's position.

77. The prevailing directions of the wind and sea, the EXXON HOUSTON's trim condition, and the low engine speed tended to broaden the turn, carrying the

ship towards the shore. Given these factors, a prudent mariner would not have attempted the starboard turn.

78. The starboard turn was towards the coast line, towards shallower water and towards potential danger. The starboard turn was grossly negligent, regardless of whether or not it could have been made successfully.

79. Backing out to sea or turning to port were viable and safe alternatives to the starboard turn. These options would have taken the EXXON HOUSTON away from the coast rapidly, allowing Captain Coyne to leave the bridge and attend to AB Denton.

80. Captain Coyne's stated reasons for rejecting the alternatives to the final turn do not excuse his choice. Captain Coyne testified that he rejected the port turn because of fears of colliding with the NENE and that he rejected backing out to sea because it was too slow and ineffective. Any danger of colliding with the NENE during a port turn could have been easily avoided by radar and/or radio contact. Backing out to sea was also a proven and effective maneuvering option.

81. Third Mate Spiller arrived on the bridge at around 2000. Captain Coyne was in doubt as to the ship's position at that time, and ordered Third Mate Spiller to take a fix of the vessel's position. Third Mate Spiller plotted the fix on chart # 19357 for time 2004.

82. When Captain Coyne saw the 2004 fix on the navigational chart, he exclaimed, "Oh, shit!" He immediately ordered an increased speed of half ahead, followed by full ahead at 2005.5.

83. The EXXON HOUSTON stranded at 2009 approximately 0.5 miles off of Barbers Point at 21° 17.8' N, 158° 07.3' W.

84. The stranding occurred at a reef that was clearly charted on Chart # 19357.

85. Over two and one-half hours elapsed between the breakout and the stranding. During that period, Captain Coyne and his crew had ample time to consider the situation calmly and deliberately.

#### K. Current Information

86. Exxon has argued that the final turn failed only because of a large current that pushed the ship onto the reef. Exxon claims that the current was predictable, that HIRI should have warned Captain Coyne about the current, and that Captain Coyne would not have attempted the final turn had he known about the current.

87. In his videotaped deposition, Dr. Karl Bathen testified as to the magnitude, direction, and predictability of the currents affecting the ship at Barbers Point on March 2, 1989. That testimony showed that the currents at the area where the ship stranded changed rapidly during the evening.

88. Exxon failed to show that the current studies done by Dr. Bathen could have been reduced to a format that would be easy for a ship's master to use. Dr. Bathen included a large number of variables in his study, including wind magnitude and direction, tide magnitude and direction, sea magnitude and direction, and bottom depths. The court finds that any current data such as that



presented by Dr. Bathen would have been either extremely difficult to use, or would have yielded only very general results.

89. Captain Coyne would not have used current data such as that prepared by Dr. Bathen had it been available to him on the bridge on March 2, 1989. Captain Coyne's decision to turn to starboard was made in haste without due consideration of several other pieces of information which should have caused him to reject the turn. For example, Captain Coyne decided to turn without looking at the chart, without fixing or plotting the vessel's position since 1830, without checking the NENE's position by radar or radio, and without consulting any of his officers or Captain Marvin. In short, Captain Coyne recklessly ignored all pertinent information that was available to him. The court is therefore convinced that Captain Coyne would not have used any current studies had they been available. Therefore, the absence of such studies was not a cause in fact of the stranding.

L. Post-Stranding Changes in SPM Operating Procedures

90. After the events of March 2, 1989, the Coast Guard has required that HIRI provide 30-minute standby tug assistance to tankers at the SPM. The required tugs must be able to handle a disabled tanker in forty knot winds. Had such tug assistance been available on March 2, 1989, Captain Coyne would have used it and the EXXON HOUSTON would not have stranded.

91. In the wake of the EXXON HOUSTON stranding, the Coast Guard has also designated the SPM as a

pilotage area. HIRI is now required to provide two mooring masters with pilot's licenses for ships at the SPM.

CONCLUSIONS OF LAW

1. This is an admiralty and maritime claim within the meaning of Fed. R. Civ. P. 9(h) and within the admiralty jurisdiction of this Court under 28 U.S.C. § 1333.

2. Pursuant to the Order Granting Motion To Bifurcate, entered on July 31, 1992, and the Order Denying Plaintiffs' Motion For Clarification, entered on August 27, 1992, Phase One of the trial was limited to a determination of issues after the breakout of the EXXON HOUSTON at 1728. Phase Two will explore the causes of the breakout.

3. The court bifurcated the trial because a substantial question existed as to whether the post-breakout navigation of the EXXON HOUSTON constituted a superseding, intervening cause of the stranding.

4. In light of the bifurcation order, the alleged causes of the stranding may be divided into three groups: the causes contributing to the breakout; HIRI's post-breakout violations of the safe berth clause; and Exxon's post-breakout navigation. In order to find that any one of these asserted causes justified the imposition of liability, the court would need to find the breach of a duty, that the breach was a cause in fact, and that the breach was a proximate cause of the stranding.

### A. The Breakout

5. Exxon has alleged that the Defendants are responsible for the breakout and that the breakout was a proximate cause of the stranding.

6. By bifurcating the trial, the court relieved Exxon of the burden of proving in Phase One that Defendants were at fault or strictly liable for the breakout.

7. Obviously, the breakout was a cause in fact of the stranding, i.e., had the mooring chain not parted, the EXXON HOUSTON would not have stranded.

8. As stated in the court's July 31, 1992 bifurcation order, in order to prove that the breakout was a proximate cause, "Exxon would have to show that the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of the grounding." *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982). The question of proximate causation is considered below.

### B. Post-Breakout Breaches of the Safe Berth Clause

9. Exxon claims that HIRI's SPM was an unsafe berth in breach of the safe berth clause in the Voyage Charterparty between Exxon Shipping Company and PRII. Exxon presented three theories of how the duty was breached: that the mooring masters were inadequate; that tug assistance was inadequate; and that current information was inadequate.

10. The court turns first to the scope of the duty. Although this court has previously referred to the safe berth clause as a "safe berth warranty," the court has not

considered the scope of the charterer's duties under a safe berth clause. Exxon argues for the Second Circuit rule that a charterparty's safe berth clause makes a charterer the warrantor of the safety of a berth. See, e.g., *Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804 (2d Cir.), cert. denied, 342 U.S. 862 (1951). HIRI counters that the better rule avoids the imposition of strict liability upon the charterer. Under this rule, a safe berth clause imposes upon the charterer a duty of due diligence to select a safe berth. *Atkins v. Fibre Disintegrating Co.*, 2 Fed. Cas. 78 (E.D.N.Y. 1868) (No. 601), aff'd 85 U.S. (18 Wall.) 272 (1873); *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1157 (5th Cir. 1990). The weight of academic opinion supports the due diligence standard. See Gilmore & Black, *The Law of Admiralty*, § 4-4 at pp.205-207 (2d Ed. 1975); J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul. L. Rev. 860, 862-869 (1975). In the absence of Ninth Circuit authority on the question, the court will follow the persuasive reasoning of the Fifth Circuit's *Orduna* opinion. Thus, the court holds that a safe berth clause imposes on the charterer a duty of due diligence to select a safe berth.

11. Having decided the scope of the safe berth duty, the court turns to whether that duty was breached after the breakout. In the following paragraphs, the court concludes that it was not.

12. The first asserted safe berth breach is the inadequacy of mooring master assistance. Exxon contends that HIRI should have provided two mooring masters, and that they should have been certified pilots. As evidence of this duty, Exxon relies upon the fact that the Coast Guard instituted these requirements after the EXXON



HOUSTON stranded. Over HIRI's objection that these were remedial measures, the court allowed this evidence at trial because the Coast Guard mandated the measures. *See In re Aircrash in Bali, Indonesia*, 871 F.2d 812 (9th Cir.), *cert. denied*, 493 U.S. 917 (1989).

13. A duly diligent charterer would not have foreseen a need to provide two mooring masters on March 2, 1989. Exxon adduced no evidence that would show that HIRI should have anticipated that additional mooring master assistance was needed. Indeed, even with the hindsight of knowing how the EXXON HOUSTON stranded, the court sees no need for two mooring masters as neither mooring master fatigue nor unavailability played a role in the casualty. Although the bridge was inadequately manned on the evening of March 2, 1989, there were available ship's officers who could have manned the bridge. Captain Coyne's failure to use his own crew does not create a duty on HIRI's part to supply another mooring master.

14. Similarly, the pilot's license requirement has not been shown to be a necessary element of a safe berth. Although a pilot would have been arguably more familiar with local conditions, lack of experience with local conditions did not contribute to the stranding. Captain Marvin had adequate experience to prevent the casualty had Captain Coyne consulted him after 1830. Thus, HIRI satisfied its safe berth duty by providing one competent mooring master, Captain Marvin.

15. Exxon's second theory is that the berth was unsafe because a tug capable of towing a disabled tanker was not available. As evidence of the need for such tug

assistance, Exxon points out that the Coast Guard has instituted this requirement since the EXXON HOUSTON incident.

16. Exxon has not met their burden of showing that a duly diligent charterer would provide tug assistance. Notably absent from Exxon's case was expert opinion as to the industry standard. In assessing due diligence, the court is left only with the Coast Guard requirement and the nature of the EXXON HOUSTON incident itself. The court considers the Coast Guard requirements to be only minimally relevant to the inquiry of whether the need for tug assistance was foreseeable before March 2, 1989. Countering Exxon's claim that tugs should have been required, the EXXON HOUSTON episode itself shows that a tanker could maneuver itself to a safe position without forward propulsion in a heavy storm. The weight of the evidence does not support Exxon's claim that a duly diligent charterer would have provided additional tug assistance on March 2, 1989.

17. The final safe berth theory is that HIRI should have provided detailed current studies of the grounding area. The evidence that a duly diligent charterer would have done such studies is minimal. Unlike the other theories of safe berth breaches, the Coast Guard has not required current studies in the wake of the EXXON HOUSTON stranding. Moreover, Exxon presented no evidence of the industry standard. HIRI did provide an experienced mooring master who briefed the ship's master on environmental conditions. The court concludes that the safe berth clause did not impose any greater duty on HIRI.



18. In summary, the court concludes that after the breakout, HIRI did not breach any duty imposed by the safe berth clause.

### C. Exxon's Negligence

19. The court now turns to whether Exxon negligently navigated the EXXON HOUSTON after the breakout.

20. Captain Coyne and all other officers and crew of the EXXON HOUSTON acted at all times relevant to this claim within the scope of their employment with Exxon, and therefore their negligence, if any, is imputed to Exxon for the purpose of this claim. *Jackson Marine Corp. v. Blue Fox*, 845 F.2d 1307, 1309-1310 (5th Cir. 1988).

21. Per the contract signed by Captain Coyne upon his arrival at the SPM, HIRI's General Instructions, Discharging/Loading Orders and Indemnification, dated March 1, 1989 (Joint Trial Exhibit 92), any negligence of Captain Marvin or of the assist vessel NENE is imputed to Exxon for the purpose of this claim. *Kane v. Hawaiian Independent Refinery, Inc.*, 690 F.2d 722, 723 (9th Cir. 1982).

22. When a moving vessel strikes a charted reef, it is presumed that the vessel is at fault. *The Louisiana*, 70 U.S. (3 Wall.) 164, 173 (1865); *Wardell v. Department of Transp.*, 884 F.2d 510, 512 (9th Cir. 1989); *McAllister Bros., Inc. v. United States*, 709 F.Supp. 1237, 1251 (S.D.N.Y.) (charted reef), *aff'd* 890 F.2d 582 (2d Cir. 1989). Because the EXXON HOUSTON stranded on a charted reef, the presumption of *The Louisiana* rule applies.

23. The presumption of fault pursuant to *The Louisiana* rule suffices to make a *prima facie* case against the moving vessel. The presumption does not disappear when conflicting evidence is presented, but must be overcome by a preponderance of the evidence. *Wardell*, 884 F.2d at 513. *The Louisiana* Rule presumption is universally described as "strong", and as one that places a "heavy burden" on the moving ship to overcome. *Id.* at 512-513 (citing *Carr v. Hermosa Amusement Corp., Ltd.*, 137 F.2d 983, 987 (9th Cir. 1943), *cert. denied*, 321 U.S. 764 (1944)).

24. The strong presumption of negligence arising under *The Louisiana* rule can be rebutted by showing, by a preponderance of the evidence, either that the collision was the fault of a stationary object, that the moving vessel acted with reasonable care, or that the collision was an unavoidable accident. *Wardell*, 884 F.2d at 513 (citing *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1988)); *Weyerhaeuser Co. v. Atropos Island*, 777 F.2d 1344, 1347 (9th Cir. 1985).

25. The EXXON HOUSTON has failed to meet its *Louisiana* rule burden of proving by a preponderance of the evidence that the EXXON HOUSTON acted with reasonable care, or that the stranding was unavoidable. Thus, the court concludes that Exxon was negligent in the navigation of the EXXON HOUSTON on March 2, 1989, and that such negligence was a proximate cause of the stranding.

26. The admiralty law further presumes that when a vessel violates a statutory rule meant to prevent strandings, the violation was a proximate cause of the stranding. *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873); *Mathes v. The Clipper Fleet*, 774 F.2d 980, 982 (9th Cir. 1985); *Waterman S.S. Corp. v. Gay Cottons*, 414 F.2d 724, 736 (9th Cir. 1969) (*Pennsylvania* rule applies to strandings).

27. The presumption arising under *The Pennsylvania* rule can be rebutted by a "clear and convincing showing of no proximate cause." *Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 825 (9th Cir. 1988).

28. At all times relevant to this claim, the Navigation Safety Regulations codified in Part 164 of Title 33 of the Code of Federal Regulations applied mandatorily to the EXXON HOUSTON and her crew. See 33 C.F.R. § 164.01.

29. The Navigation Safety Regulations provide in relevant part:

§ 164.11 Navigation Underway: General.

The owner, master or person in charge of each vessel underway shall ensure that:

(a) The wheelhouse is constantly manned by persons who:

- (1) Direct and control the movement of the vessel; and
- (2) Fix the vessel's position;

...

(c) The position of the vessel at each fix is plotted on a chart of the area and the person

directing the movement of the vessel is informed of the vessel's position;

33 C.F.R. § 164.11.

30. The rule of *The Pennsylvania* applies to the EXXON HOUSTON. The EXXON HOUSTON was in violation of the following statutory rules designed to prevent strandings:

a. Between 1830 and 2004, while the EXXON HOUSTON was under way approximately one mile or less from the shore of Oahu, Captain Coyne failed to have the position of the vessel fixed and plotted on a navigational chart, in violation of 33 C.F.R. § 164.11(c).

b. Between 1948 and 2000, during which time the EXXON HOUSTON was under way approximately one mile or less from the shore of Oahu, Captain Coyne was the only officer on the bridge, and was not capable of both directing and controlling the movement of the vessel and fixing the vessel's position, in violation of 33 C.F.R. § 164.11(a).

31. Exxon failed to sustain its burden, under *The Pennsylvania* Rule, of proving by clear and convincing evidence that the above-cited statutory violations could not have caused the stranding of the EXXON HOUSTON. Therefore, the court finds that these statutory violations were a proximate cause of the stranding of the EXXON HOUSTON.

32. In the section that follows, the court has also considered whether Captain Coyne's conduct was negligent without applying the *Pennsylvania* or *Louisiana* rules.

33. Exxon has argued that the EXXON HOUSTON was *in extremis* from the time of the breakout to the time of the stranding, and that Captain Coyne's conduct should be judged by that more lenient standard. See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851) and subsequent cases.

34. As Captain Coyne's decisions were made calmly, deliberately and without the pressure of an imminent peril, the *in extremis* rule cannot be applied in this case.

35. In considering whether Captain Coyne was negligent, the court has measured his conduct against the standard of "such reasonable care and maritime skill as prudent navigators employ for performance of similar service." *Stevens v. The White City*, 285 U.S. 195 (1932).

36. Captain Coyne acted negligently, unreasonably and in violation of the maritime industry standards in the following instances:

a. He did not deploy sufficient chain to anchor the ship at 1747.

b. He did not request assistance from the Coast Guard or other available ships.

c. He did not attempt to anchor the ship again after 1747. Anchoring the ship would have prevented the hose removal from becoming a distraction to safe navigation.

d. He failed to continue backing the vessel after 1830 until the vessel reached a safe distance from the shore.

e. He chose to linger in the vicinity of a lee shore, only .4 to .6 miles from the actual grounding line.

37. Captain Coyne's failure to plot fixes between 1830 and 2004 was grossly and extraordinarily negligent and in violation of the maritime industry standards. The danger of stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON and plotting it on the navigational chart.

38. Captain Coyne's final starboard turn was grossly and extraordinarily negligent and in violation of the maritime industry standards because he commenced it without knowing the vessel's position.

39. Even if Captain Coyne had known the vessel's position at the onset of the final turn, the turn order was still extraordinarily negligent and in violation of the maritime industry standards because it unnecessarily exposed the vessel to the danger of grounding. In light of the vessel's trim, its maneuvering characteristics, the proximity of the beach, and the weather conditions, the turn was beyond the capability of the vessel. The danger of stranding could and would have been avoided had Captain Coyne backed out or ordered a left turn instead of attempting a right turn.

#### D. Causation

40. The determination of whether a cause-in-fact was a proximate cause involves a consideration of "public convenience, of public policy, [and] of a rough sense of justice." *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991) (internal quotations and citations omitted).



41. The analysis of proximate cause involves a determination of whether superseding, intervening causes relieve any earlier causes from legal responsibility. *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1137-39 (9th Cir. 1977). A defendant asserting the existence of a superseding intervening cause bears the burden of proving it by a preponderance of the evidence.

42. The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or on the other hand, is or was not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
- (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; and

- (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

*Restatement (Second) of Torts* § 442 (cited with approval by *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991)).

43. Determining the causes of the breakout is not necessary to a determination of whether the EXXON HOUSTON's navigation was a superseding, intervening cause of the stranding. When remoteness in time or extraordinarily negligent intervening acts are established, disputed facts regarding the extent of defendant's negligence will not prevent a judgment in favor of defendant. See, e.g., *Gilmore v. Shell Oil Co.*, 613 So.2d 1272 (Ala. 1993); *Greiner v. Whitesboro Sch. Dist.*, 562 N.Y.S.2d 255 (N.Y. App. Div. 1990) (remoteness), *appeal den.*, 557 N.E.2d 1057 (N.Y. 1991); *Brazell v. Board of Educ.*, 557 N.Y.S.2d 645 (N.Y. App. Div. 1990) (extraordinary intervening negligence); cf. *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 650-53 (5th Cir. 1992) (considering only the factors of the *Restatement (Second) of Torts* § 442 in denying summary judgment motion on superseding, intervening cause).

44. The extraordinary negligence of Captain Coyne in failing to fix and plot his vessel's position superseded any force generated by the breakout of the vessel from the SPM as a cause of the stranding and was the sole proximate cause of the stranding of the EXXON HOUSTON. The analysis of the factors listed in the *Restatement (Second) of Torts* § 442 mandates this conclusion:

a. The failure to plot fixes of the vessel after 1830 caused a fully operational vessel which was at that time free of any encumbrances to her navigation to strand on a charted reef not adjacent to HIRI's SPM. That is a harm different in kind from that which would otherwise have and previously had resulted from a breakout. *Id.* § 442(a). The harm that the breakout risked was that a disabled ship would have been driven onto the shore before it could reach safety. The EXXON HOUSTON had reached a safe position and only the gross negligence of its master put it into further danger.

b. Both Captain Coyne's failure to plot fixes of his vessel's position after 1830 and the fact that the vessel stranded almost three hours after the breakout are highly extraordinary rather than normal. *Id.* § 442(b).

c. Captain Coyne's failure to plot fixes after 1830 was entirely independent of the fact of breakout; he voluntarily decided not to plot fixes in a situation where he was able to plot fixes. *Id.* § 442(c).

d. The failure to plot fixes after 1830 was solely Captain Coyne's omission in which Defendants did not participate and could not have participated. *Id.* § 442(d). Captain Coyne was aware of the danger of being set toward the lee shore and negligently failed to avoid it. Therefore, Captain Coyne's negligence is viewed as an intervening force and superseding cause which became the sole proximate cause of the stranding.

e. Captain Coyne's failure to plot fixes after 1830 carries a very high degree of culpability. *Id.* § 442(f). It was a voluntary, unforced decision, and it was grossly

negligent and in violation of all applicable industry standards and regulations.

45. Captain Coyne's extraordinary negligence in ordering the final starboard turn was also a superseding, intervening cause. Applying the factors listed in the *Restatement (Second) of Torts* § 442, the court finds as follows:

a. The harm resulting from the final turn was the stranding at a point far from the SPM. The harm that could have resulted from the breakout was a grounding before the ship regained control. These harms are different in kind. *Id.* § 442(a).

b. Captain Coyne's attempt to turn the ship towards the coast was extraordinarily negligent and not a foreseeable consequence of the breakout. *Id.* § 442(b).

c. The decision to make the final turn was made independently of the breakout and was not foreseeable. *Id.* § 442(c).

d. The Defendants did not participate in the decision to turn the ship. *Id.* § 442(d).

e. The final turn was highly culpable and grossly negligent. *Id.* § 442(f).

46. In summary, the Defendants are not legally responsible for the stranding of the EXXON HOUSTON. Although the breaking of the mooring chain imperilled the ship, the EXXON HOUSTON successfully avoided that peril. By 1830, the EXXON HOUSTON was heading out to sea and in no further danger of stranding. Only the grossly negligent actions of its master endangered the vessel further. Captain Coyne inexplicably chose to loiter

in a dangerous area without fixing his position. Then, while overly concerned by an injury to a crew member, he drove the ship onto a charted reef. It would be manifestly unjust to hold anyone legally responsible for the consequences of these acts other than Captain Coyne and his employer, Exxon.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, MAY 20 1993

/s/ Harold M. Fong  
UNITED STATES DISTRICT  
JUDGE

EXXON SHIPPING COMPANY, *et al.* v. PACIFIC  
RESOURCES, INC., *et al.*; Civ. No. 90-00271 HMF; FIND-  
INGS OF FACT AND CONCLUSIONS OF LAW

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## APPENDIX E

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY	)	Civil No.
and EXXON COMPANY, U.S.A.	)	91-00271 HMF
(A Division of	)	(Filed Jul 31, 1992)
Exxon Corporation),	)	
Plaintiffs,	)	
vs.	)	
PACIFIC RESOURCES, INC.,	)	
HAWAIIAN INDEPENDENT	)	
REFINERY, INC., PRI MARINE,	)	
INC., PRI INTERNATIONAL,	)	
INC., and SOFEC, INC.,	)	
Defendants.	)	
and	)	
PACIFIC RESOURCES, INC.,	)	
HAWAIIAN INDEPENDENT	)	
REFINERY, INC., PRI	)	
MARINE, INC., and	)	
PRI INTERNATIONAL, INC.,	)	
Third-Party	)	
Plaintiffs,	)	
vs.	)	
BRIDON FIBRES AND PLASTICS,	)	
LTD., GRIFFIN WOODHOUSE,	)	
LTD., and WERTH	)	
ENGINEERING, INC.,	)	
Third-Party	)	
Defendants.	)	

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ORDER GRANTING MOTION TO BIFURCATE, DENYING CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING MOTION TO STRIKE THIRD-PARTY GRIFFIN WOODHOUSE, LTD.'S REPLY MEMORANDUM AND GRANTING MOTION, IN THE ALTERNATIVE, FOR LEAVE TO FILE RESPONSIVE MEMORANDUM

INTRODUCTION

On July 27, 1992, the court heard third-party defendant Griffin Woodhouse, Ltd.'s ("Griffin") motion to bifurcate or, in the alternative, to continue trial filed on June 3, 1992. Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc. (collectively "HIRI") filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 18, 1992. Defendant and third-party defendant Bridon Fibres and Plastics, Inc. ("Bridon") also filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 19, 1992. Defendant Sofec, Inc. ("Sofec") also filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 22, 1992. Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A. (collectively "Exxon") filed a memorandum in opposition on June 18, 1992. Griffin, in turn, filed a memorandum in reply on July 16, 1992. On July 24, 1992, Exxon filed a motion to strike Griffin's reply memorandum or, in the alternative, for leave to file responsive memorandum.

Bridon filed a cross-motion for partial summary judgment on June 18, 1992, which was joined by Sofec and Griffin on June 22, 1992, and by HIRI on June 23,

1992. Exxon filed a memorandum in opposition on July 7, 1992. Bridon, in turn, filed a memorandum in reply on July 16, 1992.

BACKGROUND

This case arises out of the March 2, 1989 breakaway of the EXXON HOUSTON, which was owned and operated by Exxon, from HIRI's single point mooring (SPM) at Barber's Point and subsequent grounding approximately three hours later. The breakaway occurred when a Type "C" chafe chain, which was used to connect the SPM to the EXXON HOUSTON, parted. Post-accident, destructive testing of the chain has indicated that the welds of the chain links *may* have been defective.

DISCUSSION

I. CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine

issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the non-moving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. But cf., *id.*, 477 U.S. at 328, 106 S.Ct. at 2555-56 White, J., concurring)

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. See *T.W. Elec.*, 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), cert. denied, 440 U.S. 981 (1979). Moreover, "if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468, citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. See *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2512 (1986). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Also, inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.* Inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the non-moving party. *Id.*<sup>1</sup>

#### B. Analysis

With its cross-motion, Bridon seeks a judgment on the pleadings that the parting of the Type "C" chafe chain, which connected the EXXON HOUSTON to the

<sup>1</sup> For the purposes of deciding this motion, the court applies substantive admiralty law. With respect to the adoption and application of products liability law in admiralty cases, the Supreme Court and the Ninth Circuit have borrowed substantially from principals developed in "land-based" jurisprudence. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-75 (1986); *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1133 (9th Cir. 1977).



SPM, was not the proximate cause of the grounding of the EXXON HOUSTON. According to Bridon, the testimony of the vessel's officers shows that, after the EXXON HOUSTON broke out from the SPM, the vessel had reached and remained at a point of safety for one hour and fifteen minutes before she left the safe area and drifted towards the shore, eventually grounding two hours and fifty minutes after the breakout. Bridon further contends that the "undisputed evidence on the record shows that the decision of the vessel's Master to stop the progress of the vessel along her course away from the shore was a voluntary decision made when the vessel was in no imminent danger and when he had ample time to reflect on possible courses of action." As such, Bridon argues that Exxon cannot establish a causal nexus or connection between the parting of the chafe chain and the subsequent grounding nearly three hours later.

At the time of the breakout, the EXXON HOUSTON was connected to the SPM by a mooring assembly, which included a Type "C" chafe chain, manufactured by Griffin and sold by Bridon, and by two oil hoses, eighteen inches (18") in diameter and eight hundred feet (800') long, which were mounted on the ship's manifold. The cause of the failure of the chafe chain and the resulting breakout is disputed.

Once the chafe chain parted, the master of the EXXON HOUSTON, Captain Dick, attempted to prevent the oil hoses from breaking by bringing the vessel's head to the SPM buoy. In spite of his efforts, one hose broke close to the ship, dangling harmlessly from the manifold, whereas the second hose tore at the buoy, with its entire

length remaining connected to the manifold. For the purpose of the motion, Bridon does not contest Exxon's claim that the second hose obstructed the navigation of the EXXON HOUSTON by preventing the vessel from proceeding ahead out of concern that the hose would become entangled in the propeller. Assuming this obstruction, the navigation of the EXXON HOUSTON was restricted to backward movement using astern propulsion.

Furthermore, Bridon assumes, for the purpose of the motion, that from the time of the breakout at approximately 1715 hours until 1803 hours, Captain Dick was attempting to gain control of the vessel. At 1803, Captain Dick set the vessel, moving astern, on a westerly course, roughly parallel to the coastline between Pearl Harbor and Barbers Point. Bridon's Memorandum in Support of Cross-Motion for Partial Summary Judgment, Exhibit B at 212-13, 233 (Deposition of Second Officer Hallock G. Davis, III) ("Davis Deposition"). At 1830 hours, it appears that the EXXON HOUSTON had cleared Barbers Point and was in some 100 feet of water.

The parties dispute, however, whether the EXXON HOUSTON could have continued on the same course until it was positioned far from the shoreline.<sup>2</sup> Although Exxon has admitted that there was no mechanical limitation on the capabilities of the vessel's engines which would have precluded her from continuing on her

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<sup>2</sup> Furthermore, the parties dispute whether the navigation or maneuvering of the EXXON HOUSTON that led to her grounding, *after* the hose had been disconnected, was negligent.



1803-1830 course, Captain Dick has testified that circumstances precluded him from continuing to navigate the EXXON HOUSTON offshore.

Q. You said that it would be prudent to get further offshore, but the circumstances made it difficult to do so?

A. That's true. . . .

Q. Now, what circumstances are we talking about?

A. The position of the hose, the wind, sea and swell conditions, the ship being able to only use astern propulsion because of the position of the hose.

Q. Did these circumstances remain constant throughout the entire period from the breakaway up and to the grounding?

A. No, they were ever changing, but always present.

Exxon's Memorandum in Opposition, Exhibit 1 at 374-75 (Deposition of Kevin P. Coyne, f.k.a. Kevin Dick) ("Dick Deposition").

On the other hand, Second Officer Davis, who was responsible in part for the navigation of the vessel, testified that there was nothing to prevent Captain Dick from continuing on his westerly course - away from shore - proceeding astern.

Q. Was the ship proceeding generally in a westerly direction from 1803 until 1830?

A. That's correct.

Q. Do you know of any reason why the vessel, after 1830, could not have proceeded in the same direction?

A. No, I don't.

Q. Was - are you aware of any necessity for change of direction of the vessel at - after 1830?

A. Not that I can recall.

Davis Deposition at 233-35; *see also* Exxon's Memorandum in Opposition, Exhibit 2 at 318 (Deposition of Steve Marvin, HIRI's mooring master) (describing "beautiful" ease with which the EXXON HOUSTON was able to proceed astern). The vessel allegedly remained in the general vicinity of its 1830 position, southwest of Barbers Point, for one hour and fifteen minutes, until 1948 hours, during which time the crew was disconnecting the oil hose. In the process, the hose damaged the vessel's crane and put its operator into danger, requiring the assistance of other crew members. At 2006 hours, the vessel grounded.

It is elementary that Exxon has the burden of proving that the breakout of the vessel from her mooring was the proximate cause of the grounding. 1 Am. Law Prod. Liab.2d *Proximate Causation* § 4:3 (1987); 63 Am. Jur.2d *Products Liability* §§ 261, 264 (1984). Proximate causation is defined as "that cause which, in a natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred." 1 Am. Law Prod. Liab.3d *Products Liability* § 4:1 (1987); *see generally* *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 n.1, 1991 A.M.C. 1217

(9th Cir. 1991) (citing Restatement (Second) of Torts on relevant factors used to determine whether intervening force is superseding cause). To prove that the failure of the Type "C" chafe chain proximately caused the grounding, Exxon would have to show that the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of the grounding. *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982).<sup>3</sup>

The Court of Appeals for the Ninth Circuit has adopted the Restatement (Second) of Torts for the elements of a defense of superseding cause. *Hunley v. Ace Maritime Corp.*, *supra*.

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the operation;

<sup>3</sup> Where the relevant facts show that the causal connection between the defendant's negligence and the plaintiff's injury is remote, the question of causation is decided by the court as a matter of law. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360 (3d Cir. 1990); see also *Rexall Drug Co. v. Nihili*, 276 F.2d 637, 645 (9th Cir. 1960) (proximate cause becomes a question of law if evidence is insufficient to raise reasonable inference that act complained of was proximate cause of injury).

- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or was not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
- (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
- (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Restatement (Second) of Torts § 442. In support of its motion, Bridon writes that the court need not determine whether any negligence on the part of Captain Dick created such an intervening force; instead, Bridon relies on the (disputed) fact that the EXXON HOUSTON reached a "point of safety" to establish a superseding cause of the grounding. Bridon refers the court to *V/O Exportkhleb and Insurance Co. of U.S.S.R. (Ingosstrakh) Ltd. v. S.S. William A. Reiss*, 1983 A.M.C. 782 (1982) (E.D. Ohio 1982) for the proposition that "when a vessel which successfully avoids a collision or other emergency, and after having reached a point of safety, goes aground, the initial negligence of the other vessel which had placed the grounded vessel in danger is extinguished as a proximate cause of the grounding." Bridon's Memorandum in Support of Motion for Partial Summary Judgment at 13.

Even though Bridon has pled its case persuasively, the motion must be denied. First, there is a material issue

of disputed fact as to whether Captain Dick was responding to or struggling with the consequences of the breakout, and the attendant, changing circumstances of the rough seas, from the time of the breakout up until the time of the grounding. See Restatement (Second) of Torts §§ 443 and 445 (explaining that actions taken in consequence to situation created by negligent conduct are not superseding cause of harm). Because of the conflicting testimony on the capacity of the EXXON HOUSTON to proceed astern, and farther off shore, the issue of causation is not appropriate for summary adjudication at this stage.

Second, Bridon's characterization of the law in this area is only partially accurate. In *V/O Exportkhleb*, the plaintiff's ship went aground five to six minutes after it had narrowly avoided colliding with the defendant's vessel. The district court held that, because the shallow waters were not thrust upon the plaintiff's ship suddenly and the plaintiff had ample opportunity to avoid the danger, the plaintiff's negligence after the passing was the proximate cause of the grounding. As such, in order to find that the navigation of the EXXON HOUSTON was a superseding cause of the grounding, this court would be required to find that Captain Dick's actions, in arresting the movement of the vessel at 1830 and, subsequently, in maneuvering the vessel, were, in fact, negligent.<sup>4</sup> See

<sup>4</sup> According to Bridon, once the EXXON HOUSTON was in a safe position in deep water for over one hour, any forces that may have initially been set in motion by the parting of the chafe chain had long since been extinguished. In this regard, Bridon appears to rely on the doctrine of *res ipsa loquitur* – the grounding must have resulted from the (negligent) navigation of the

*Dougherty v. United States*, 207 F.2d 626, 630, 1953 A.M.C. 1541, 1547 (3d Cir. 1953), quoted in *V/O Exportkhleb*, 1983 A.M.C. at 739. It is not enough, for the purpose of breaking the chain of events set in motion by the breakout, for the court to find that the EXXON HOUSTON had reached a point of safety.

The court would also note that the negligence standard required to establish a superseding cause is higher than in ordinary circumstances. As the Restatement (Second) of Torts instructs:

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

- (a) the actor at the time of his negligent conduct should have realized that a third person might so act, or
- (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or
- (c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

vessel. As discussed above, a finding that the navigation of the vessel was the superseding cause of the grounding must be predicated on a finding of negligence.



Restatement (Second) of Torts § 447 (emphasis altered). The evidence presented in the record is clearly insufficient to support a finding by this court, on summary judgment, that the navigation of the EXXON HOUSTON by its master was negligent, least not extraordinarily so.

Accordingly, the motion for partial summary judgment is DENIED.

## II. MOTION TO BIFURCATE OR IN THE ALTERNATIVE, TO CONTINUE TRIAL

Griffin seeks to bifurcate the issue of causation, as between the breakout and the post-breakout navigation of the EXXON HOUSTON, from the other liability issues in the case – that is, the extent to which the master's navigation of the EXXON HOUSTON caused its grounding on March 2, 1989. Griffin asserts that bifurcation could obviate the need for extensive discovery, trial preparation, and weeks of trial if the court first determines the cause or comparative causes of the grounding, excluding the cause of the breakout. In this regard, Griffin suggests that such an inquiry is discrete and much simpler for adjudication than the cause of the breakout itself.

According to the Marine Casualty Report submitted by Exxon following the accident, the damages alleged by Exxon for the loss of the EXXON HOUSTON amounts to approximately eighty percent (80%) of the total damages claim. Assuming that these damages are resolved or allocated in the first phase of a bifurcated trial, Griffin and the other defendants assert that the parties will likely settle the remaining twenty percent (20%) of claimed damages. Exxon disputes these estimates. The court need

not, however, resolve this dispute as a predicate to deciding the motion to bifurcate.

The court has broad discretion to order separate trials pursuant to Rule 42(b) of the Federal Rules of Civil Procedure when a separate trial will further convenience, avoid prejudice or "be conducive to expedition and economy." See *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1517 (9th Cir. 1985); *Airlift International v. McDonnell Douglas Corp.*, 685 F.2d 267, 269 (9th Cir. 1982). Here, a separate trial offers the probability of settlement after the conclusion of the first phase in the opinion of every defendant. Only Exxon holds to the contrary. Additionally, if the court determines that the navigation of the EXXON HOUSTON was the proximate cause of its grounding, then it would be unnecessary for the court to resolve the issue of "comparative fault." See *Protectus Alpha Navigation v. North Pacific Grain Growers Ass'n*, 767 F.2d 1379 (9th Cir. 1986). In *Protectus*, the plaintiff's ship caught fire while moored at the dock. The defendants employees apparently panicked and negligently cast the ship adrift whereafter the ship was destroyed by fire because the fire fighters could not reach her. In affirming the trial court's disposition, the Court of Appeals for the Ninth Circuit explained why a determination of comparative fault was unnecessary.

The [district] court found that 92.5% of the loss was sustained after the ship was set adrift, and therefore attributed that percentage of liability to [defendant] North Pacific.

Appellant [North Pacific] contends that the district court erred in ignoring principles of

comparative negligence and apportioning damages based upon its view of causation, rather than culpability. . . .

However, as [plaintiff] Protectus points out, there is no shipowner negligence to "compare." Even if Protectus were negligent in causing the fire, such negligence had ceased to be an operating force when the vessel was cast off by North Pacific's employees. The testimony of each expert and fireman who viewed the fire that night was that the fire would have been put out in fifteen to twenty minutes had the vessel not been cast off. . . .

Where injuries can properly be apportioned to separate causes based on evidence in the record, there is no occasion to invoke the doctrine of comparative negligence . . . The whole point of comparative negligence is that the relation between injury and cause cannot be accurately determined, and an allocation based on the degree of negligence of each party becomes the measure of liability.

767 F.2d 1383-84; see also *Newby v. F/V Kristen Gail*, 937 F.2d 1439, 1992 A.M.C. 149 (9th Cir. 1991) (comparative fault inapplicable where trier of fact concludes that losses can be attributed to separate causes).

On the other hand, if the court does not find that the navigation of the vessel was the superseding cause of the grounding, the court can still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.E.2d 251 (1975). As

discussed earlier, a determination of whether the master's alleged negligence is an intervening, superseding cause, which would cut off defendants' liability at the point of the intervening event, requires an examination of all the claimed causes of the casualty. See *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 1991 A.M.C. 1217 (9th Cir. 1991); *White v. Roper*, 901 F.2d 501 (9th Cir. 1990).

The court is well aware of the possibility that the issue of causation with respect to the breakout may still require a second phase of trial, perhaps before a jury. The court, however, is in the best position to determine whether bifurcation *in this case* promotes judicial economy. The court finds that it does.

Accordingly, the motion to bifurcate is GRANTED so that the first phase of the trial will be limited to the issue of causation with respect to the EXXON HOUSTON's grounding, but not including the issue of causation with respect to the breakout itself.<sup>5</sup>

Finally, the court must address Exxon's motion to strike Griffin's reply memorandum or, in the alternative, for leave to file responsive memorandum. After reviewing Griffin's moving papers, the court does not find that Griffin changed its position vis-a-vis the scope of the first phase of the bifurcated trial in a manner that would violate Local 220-4. Nevertheless, the court, in its discretion, will permit Exxon to file the responsive memorandum attached as an exhibit to its motion. Exxon should be

<sup>5</sup> Having granted the motion to bifurcate, the court does not address the motion, in the alternative, to continue trial.

advised that the court has carefully reviewed and considered the proposed filing in connection with its ruling on the motion to bifurcate.

Accordingly, the motion to strike is DENIED and the motion, in the alternative, for leave to file responsive memorandum is GRANTED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 31, 1992

/s/ Harold M. Fong  
UNITED STATES  
DISTRICT JUDGE

EXXON SHIPPING COMPANY and EXXON COMPANY,  
U.S.A. (A division of Exxon corporation) vs. PACIFIC  
RESOURCES, INC., HAWAIIAN INDEPENDENT REFIN-  
ERY, INC., PRI MARINE, INC., PRI INTERNATIONAL,  
INC., and SOFEC, INC.; PACIFIC RESOURCES, INC.,  
HAWAIIAN INDEPENDENT REFINERY, INC., PRI  
MARINE, INC., and PRI INTERNATIONAL, INC. vs.  
BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN  
WOODHOUSE, LTD., and WERTH ENGINEERING, INC.

Civil No. 91-00271 HMF

ORDER GRANTING MOTION TO BIFURCATE, DENY-  
ING CROSS-MOTION FOR PARTIAL SUMMARY JUDG-  
MENT, DENYING MOTION TO STRIKE THIRD-PARTY  
GRIFFIN WOODHOUSE, LTD.'S REPLY MEMORAN-  
DUM AND GRANTING MOTION, IN THE ALTERNA-  
TIVE, FOR LEAVE TO FILE RESPONSIVE  
MEMORANDUM

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**In The  
Supreme Court of the United States**

**October Term, 1995**

**EXXON COMPANY, U.S.A.;  
EXXON SHIPPING COMPANY,**

*Petitioners,*

**v.**

**SOFEC, INC.; PACIFIC RESOURCES, INC.;  
HAWAIIAN INDEPENDENT REFINERY, INC.;  
PRI MARINE, INC.; PRI INTERNATIONAL INC.,**

*Respondents,*

**v.**

**GRIFFIN WOODHOUSE, LTD. AND  
BRIDON FIBRES AND PLASTICS, LTD.,**

*Third-Party Respondents.*

**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

**RESPONDENTS' AND THIRD-PARTY RESPONDENTS'  
JOINT BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI**

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## INTRODUCTION

Certiorari, which "is not a matter of right, but of judicial discretion," is not warranted because there are no "special and important reasons"<sup>1</sup> presented by this case. Sup. Ct. Rule 10. Contrary to Petitioners' contentions, (1) the Ninth Circuit's decision conforms to this Court's admiralty policies; (2) any purported conflict among the circuits with regard to *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975) ("*Reliable Transfer*") and *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 84 S. Ct. 748, 11 L.Ed.2d 732 (1964) ("*Italia Societa*") are reconcilable on the facts of the cases; and (3) bifurcation of the trial by the District Court was appropriate and not violative of due process.

This is a case in which the gross negligence of a captain placed his vessel in a position of peril wholly of his own making. It is one which involves a unique set of facts and circumstances which are highly unlikely to recur and within which there are simply no national or international ramifications that necessitate review by this Court.

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<sup>1</sup> The Proposed Supreme Court Rule 10 states that "A petition for a writ of certiorari will be granted only where there are compelling reasons therefor."



## COUNTERSTATEMENT OF THE CASE<sup>2</sup>

Petitioners have once again attempted to present the events of March 2, 1989 as a pell mell rush to disaster. As demonstrated by the record, however, nothing could be farther from the truth, nothing could be farther from the evidence, nothing could be farther from the findings of the trial court, and nothing could be farther from the affirmation of the appellate court. Respondents, mindful of the admonition of this Court's Rule 15, will attempt to demonstrate by this Counterstatement of the Case, that the series of actions taken by the master of the EXXON HOUSTON and his crew over the space of approximately three hours were, as found by the trial court and affirmed by the Ninth Circuit Court of Appeals, the sole cause of the vessel's stranding. As such, these actions and/or omissions operated as a superseding intervening cause to sever any liability or responsibility on the part of Respondents. These actions and omissions by the master and the vessel's crew from the breakout to the stranding were done in a calm and deliberate manner, without any pressure of eminent peril. (CL 34.) In sum, it was the master's

<sup>2</sup> While Petitioners' Statement of Facts contains no significant misstatements of fact, Respondents have set forth a more complete and accurate recitation of the facts. Citations to the record contained herein are abbreviated as follows:

- CR: Clerk's Record
- RT: Reporter's Transcript
- ER: Excerpts of Record
- SER: Supplemental Excerpts of Record
- FF: Findings of Fact contained in Appendix D to Petition for Writ of Certiorari
- CL: Conclusions of Law contained in Appendix D to Petition for Writ of Certiorari

gross negligence alone that brought about the stranding. (CL 46.)

The contract which brought Petitioners' vessels to the solitary single point mooring buoy (SPM) at the offshore port operated by Respondent Hawaiian Independent Refinery, Inc. ("HIRI") in Hawaii called for HIRI to receive and pay for multiple shipments of Alaska North Slope crude oil delivered by Petitioners' vessel, and did so in broad form language only. (FF 7, 10; CR 433, Exhibit "A", SER 13-15.) Further, on multiple occasions prior to the incident of March 2, 1989, a number of Petitioners' vessels carrying various quantities of Alaska North Slope crude oil had called at the same SPM in the HIRI offshore port pursuant to this contract. In fact, on at least four of these occasions, the vessel making deliveries to the HIRI SPM was the EXXON HOUSTON itself, and, on at least two of those prior occasions, the EXXON HOUSTON had been under the command of Captain Coyne. (FF 15.) At no time prior to the breakout did Captain Coyne, any of Petitioners' other masters, or anyone else on behalf of Petitioners ever protest the use of HIRI's SPM, or claim in any manner that the port was unsafe under the terms of the contract. (2/9/93 RT 13, 33; 2/11/93 RT 175-76.)

The particular voyage of the EXXON HOUSTON, which resulted in these proceedings, began, from Respondents' perspective, on March 1, 1989. This was when the vessel arrived at HIRI's SPM located approximately a mile and a half off Ewa Beach on the southern shore of the island of Oahu, and began discharging its cargo of Alaska North Slope crude oil. (2/9/93 RT 47-48; Joint Exhibits ("J.Exh.") 1, 2, 29; ER 245, 246.)

The following day, on March 2, 1989, a "Kona" storm with winds and seas coming generally from the south,



caused a link in the chafe chain, part of the mooring assembly holding the vessel to the SPM, to break. (FF 25.) At the time the chain broke, the vessel was fully manned and operational. (FF 18.) The break in the chain released the EXXON HOUSTON from the mooring, causing the vessel to begin to drift, and putting the twin floating discharge hoses under tension. (FF 25.) This tension eventually caused the hoses to part (break). The first of these hoses parted close to the water line of the vessel. (FF 26.) This hose did not thereafter pose a threat to the ship's maneuverability. (FF 26.) The second hose parted at 1728 (5:28 p.m.) (hereinafter 24-hour clock references will be used to conform with the trial record) on March 2, 1989. (FF 27; 2/9/93 RT 37-38; 2/10/93 RT 23, 24, 31-38; 2/12/93 RT 194.)

The trial court designated the point in time that the second hose broke (1728) as the "breakout," and this point became the initiating time for the trial which has led to this Petition. (FF 27.) The holding of the trial court, which found the Petitioners' actions and omissions to be the sole cause of the stranding of March 2, 1989 (CL 44), and its affirmation by the Ninth Circuit Court of Appeals, focus upon the events that followed the breakout. The events which preceded 1728 on March 2, 1989, are simply irrelevant, and play no part in the review that this Court must make in determining whether or not certiorari is appropriate.

After the breakout at 1728 on March 2, 1989, there followed a period of two hours and 41 minutes which ended with the EXXON HOUSTON stranding on a chartered reef less than 1/2 mile from Barbers Point Light at 2009. (2/10/93 RT 129; 2/11/93 RT 190-191; J.Exh. 27, 28, 30.) During this two hour and 41 minute period, the

vessel's master, Captain Coyne, maneuvered the EXXON HOUSTON through a series of different phases. These phases were identified by the District Court in various sub-groupings within its findings of fact. These same phases are referred to in the Ninth Circuit Court of Appeals' affirmation and will be used here by Respondents in this Counterstatement of Facts. During this almost three-hour period, Captain Coyne and the crew of the EXXON HOUSTON had ample time to consider the situation and react accordingly. (FF 85.) The events did not tumble pell mell toward eventual disaster, as Petitioners would have this Court believe. (2/11/93 RT 144, 162, 170, 171; 2/17/93 RT 50, 82; 2/18/93 RT 64; SER 68 [Davis depo]; SER 84-86 [Kowalchuk depo].) Instead, Captain Coyne's post-breakout decisions were found to have been made calmly, deliberately and without the pressure of imminent peril. (CL 34.)

#### PHASE I - THE BREAKOUT

When the second hose parted at approximately 1728, it tore a heavy metal spool piece off the SPM, leaving approximately 840 feet of that hose connected to the ship's port manifold with approximately 100 feet of the hose submerged due to the weight of the spool piece. (FF 28; 2/11/93 RT 229; 2/12/93 RT 194; SER 65-66 [Davis depo].) At about 1730, two minutes after the breakout, the U.S. Coast Guard initiated a radio call to the EXXON HOUSTON and asked Captain Coyne if assistance was needed. The Captain refused this offer of assistance. He did not contact the Coast Guard again until after the stranding, two hours and thirty-nine minutes later. (FF 34; 2/10/93 RT 83-86; 2/11/93 RT 142; 2/12/93 RT 227-228.)

## PHASE II - ATTEMPT TO ANCHOR

At approximately 1740 (12 minutes after the breakout), Captain Coyne attempted to anchor by dropping his starboard bow anchor and paying out one shot (90 feet) of chain. (SER 63 [Davis depo].) The area where the anchor was dropped had a depth of approximately 60-66 feet. (FF 35.) One shot of chain could not hold the ship in this depth of water. (FF 37.) Five or six shots of chain would have been required. (FF 37; 2/10/93 RT 40, 41, 44, 78; 2/12/93 RT 164; 2/26/93 RT 22; J.Exh. 2.) The EXXON HOUSTON had 12 shots of chain available. (FF 37.) Captain Coyne did not utilize the standard maritime practice of deploying extra chain by either going slightly astern (2/26/93 RT 22), or by pulling the chain out with the anchor windlass (2/18/93 RT 214). At 1747, after an attempt of only seven minutes, and still with only one shot of chain out, Captain Coyne abandoned the anchoring attempt. (FF 38; 2/10/93 RT 44, 45, 48; J.Exh. 2.)

At this point, Captain Coyne also negligently ignored the advice of Captain Marvin, the HIRI Mooring Master, to proceed to a safe anchorage known to Captain Marvin and near to the SPM. (2/12/93 RT 211-212; 2/17/93 RT 77-81; SER 90-91 [Spear depo].) After raising the starboard anchor at 1747, Captain Coyne never again attempted to anchor the EXXON HOUSTON even though a review of the ship's track revealed numerous areas where the vessel could have been safely anchored. (FF 41-42.)

## PHASE III - THE TRANSIT

By 1803, the 75-ton, 65-foot, twin-screw, 800-horsepower assist vessel NENE had secured a line to the hose that remained attached to the EXXON HOUSTON, and the EXXON HOUSTON began backing to sea. (FF 43-44; 2/11/93 RT 227-3; 2/12/93 RT 112, 211, 212; J.Exh. 2.) Thus, just 35 minutes after the breakout and two hours and six minutes before the stranding, the cargo hose was under the positive control of the NENE; control the NENE did not relinquish until after the stranding. (FF 43.)

For the next 27 minutes (1803-1830), the EXXON HOUSTON backed in a general westerly direction at a speed of approximately two knots over the ground on an engine order ("bell") of half astern. (FF 44.) It followed an approximate course of 260 degrees true. (FF 44; 2/12/93 RT 211, 212, 219, 230; 2/17/93 RT 95; SER 72, 75 [Davis depo].) This course took the EXXON HOUSTON out to sea and away from shallow waters. (FF 44; 2/12/93 RT 219, 230; 2/10/93 RT 141, 145, 158; SER 67 [Davis depo]; J.Exh. 2.) The ship's position was noted on the navigational chart kept on the bridge of the EXXON HOUSTON at times 1803, 1820, and 1830. (FF 45; SER 62 [Davis depo]; J.Exh. 2.) The position on the chart at 1830 was to be the last plotted position of the EXXON HOUSTON until 2004, approximately one hour and 34 minutes later. (FF 49; 2/10/93 RT 108-110, 128; 2/11/93 RT 122; SER 92 [Spear depo]; J.Exh. 1, 2.) This 2004 position was taken just five minutes before the stranding with the vessel well into the final turn. (FF 81.)



#### PHASE IV – POST-1830 MANEUVERS

At 1831, Captain Coyne made a completely unforced decision to stop backing to sea (FF 46; 2/10/93 RT 142:17-23), and began a series of maneuvers called "backing and filling." Backing and filling was an alternate series of short ahead and astern bells in an attempt to maintain a sheltered area on the port side of the vessel for the removal of the hose. (2/10/93 RT 141-142, 154-156; 2/12/93 RT 219; 2/17/93 RT 95, 132, 141; J.Exh. 1, 2, 27, 28, 30.) Captain Coyne unilaterally decided to stop backing the vessel away from shore despite the fact that backing the vessel further to sea could have been accomplished without significant risk to the EXXON HOUSTON or the assist vessel NENE, and, in fact, continued backing posed much less of a risk than remaining near the lee shore while the Kona storm tended to push the ship toward shore. (FF 47.)

The backing and filling operation caused the ship to cease its progress away from shore and, in fact, caused the EXXON HOUSTON to begin to loiter at a position approximately one mile from the shore and about a half mile from the grounding line. (FF 46, 48; 2/10/93 RT 108-110; 2/19/93 RT 22, 53; 2/26/93 RT 32.)

#### PHASE V – NAVIGATION AFTER 1830

Even though there were adequate charted aids to navigation in the vicinity of Barbers Point where the EXXON HOUSTON was lingering, and two charts were available for the navigation of the vessel, there were no navigational positions plotted on either chart between 1830 and 2004 on the evening of March 2, 1989. (FF 50, 51; 2/10/93 RT 108-110, 128; 2/11/93 RT 122; SER 59-60, 64,

69, 76 [Davis depo]; J.Exh. 1, 2.) The trial court found that a prudent mariner would have fixed and plotted his vessel's position at least every fifteen to twenty minutes, and that it could be done without obliterating the information or prior fixes on the chart. (FF 50, 52; 2/18/93 RT 134, 234; 2/19/93 RT 129; 2/24/93 RT 93, 140, 142, 183; 2/26/93 RT 33; J.Exh. 2; SER 82 [Huhnke depo].) In fact, the frequent plotting of the vessel's position would have enabled Captain Coyne to determine the effects of wind, sea and any currents on the tanker and would have alerted him that he was approaching danger. (FF 53; 2/18/93 RT 238; 2/19/93 RT 23.) When Captain Coyne initiated the final turn at 1956, one hour and twenty-six minutes had passed since the last plotted position on any chart. Captain Coyne did not look at the navigational chart before commencing the turn. (FF 75.) Captain Coyne did not, in fact, know the EXXON HOUSTON's position when he started that final and fatal turn toward the lee shore of Oahu. (FF 61, 62, 76; 2/26/93 RT 32; 2/19/93 RT 128-129; 2/10/93 RT 125, 128-129; 2/11/93 RT 42, 144; J.Exh. 1, 2.)

#### PHASE VI – HOSE DISCONNECT AND CRANE FAILURE

At 1944, twenty-five minutes before the stranding, while both the EXXON HOUSTON and the NENE were being controlled by Captain Coyne, the vessels moved apart. This caused the EXXON HOUSTON's crane holding the detached hose to collapse and allowed the NENE to pull the hose clear of the EXXON HOUSTON by 1947. (FF 64-65; 2/10/93 RT 111, 114, 198; 2/11/93 RT 77; 2/13/93 RT 64, 78, 107; 2/17/93 RT 36-39, 101, 107; J.Exh. 28.) At 1948, Captain Coyne sent Second Mate Davis from



the bridge to evaluate seaman Denton, who was operating the crane when it collapsed. (FF 67; 2/10/93 RT 116; 2/18/93 RT 133; SER 61, 70 [Davis depo].) Seaman Denton had not suffered any injury. (SER 78-80 [Denton depo]; 2/11/93 RT 147:16-149:9.) Second Mate Davis was not immediately replaced on the bridge by another officer, although other officers were available. (FF 68, 69; 2/10/93 RT 128; 2/11/93 RT 24; SER 61, 73 [Davis depo].) Thus, from approximately 1948 to 2000, including the point in time when the final turn was initiated, Captain Coyne was the only officer on the bridge. *Id.* This failure to adequately man the bridge was in direct derogation of Exxon Shipping's navigational and bridge manual. (FF 68-70; 2/11/93 RT 25; J.Exh. 245, 250.) The trial court found that had the bridge been manned properly, the danger of stranding would have been avoided. (FF 71.)

#### PHASE VII – THE FINAL TURN

Captain Coyne, while he was the sole officer on the bridge (2/10/93 RT 116), and without looking at a navigational chart or knowing the ship's position, commenced the "final turn" at 1956. This was a turn to the right and toward the lee shore, a turn which the Court described and found to be "grossly negligent." (CL 38, 2/10/93 RT 124-129; 2/11/93 RT 42; 2/18/93 RT 212, 241, 243; 2/19/93 RT 1, 2, 20, 149-150; 2/24/93 RT 141-142; 2/26/93 RT 16, 22, 32, 39-40; J.Exh. 27, 28, 30.) By Captain Coyne's own testimony, this was a considered, unhurried decision. (CL 34.) In selecting this final turn toward the lee shore, the Captain rejected all other safe alternatives, which included a turn to the left, or port, away from the lee shore, or simply continued backing to sea, which had proven to be an effective maneuvering option. (FF 79, 80.)

At approximately 2000 (four minutes after the start of the final turn, and nine minutes before the stranding), Third Mate Spiller arrived on the bridge. He was asked by Captain Coyne to determine the ship's position and to plot that position on a chart. (2/10/93 RT 128-129; SER 94, 102 [Spiller depo].) Third Mate Spiller plotted the ship's position on a chart, labeled it with the time, 2004, and walked to the port wing of the bridge to show it to Captain Coyne. (FF 81.) When Captain Coyne saw the 2004 fix on the navigational chart, he exclaimed "Oh, shit!" (FF 82; SER 107-108 [Spiller depo]), and immediately ordered an increased speed of half ahead, followed, at 2002.5, by full ahead. (FF 82; SER 94-108; J.Exh. 1.) Three and a half minutes later, at 2009, the EXXON HOUSTON stranded on a reef that was clearly shown on the chart bearing the 2004 position. (FF 83, 84; 12/10/93 RT 128-129; J.Exh. 1.)

Captain Coyne's decision to turn to the right was made without any consideration of the other pieces of information which should have caused him to reject that turn. He did so without looking at a chart, without fixing or plotting the vessel's position for an hour and a half, without checking the NENE's position by radar or otherwise, and without consulting any of his officers or the Mooring Master. (FF 89.) Thus, Captain Coyne recklessly ignored all pertinent information that was available to him and proceeded on a course that resulted in the stranding of the EXXON HOUSTON at 2009, almost three hours after the breakout. (FF 89.) The underlying facts and findings in this proceeding are succinctly stated by the following concluding remarks of Judge T.G. Nelson writing for the Ninth Circuit in affirmation:

In sum, the district court found that Captain Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout. Because the district court's findings are well supported by the record, we hold they are not clearly erroneous.

### CONCLUSION

We hold the district court did not err in finding Captain Coyne's extraordinary negligence to be the sole proximate and superseding cause of the damage to the *Houston*, and we AFFIRM.

Opinion of the United States Court of Appeals for the Ninth Circuit, Appendix A to Petition for Writ of Certiorari, at App. 25.

### CERTIORARI IS NOT WARRANTED

#### I. THERE IS NO CONFLICT AMONG THE CIRCUITS SIGNIFICANT ENOUGH TO WARRANT REVIEW BY THIS COURT

Petitioners contend that the decision below by the Court of Appeals for the Ninth Circuit "deepens" an existing conflict among the circuits over the applicability of common law intervening and superseding cause doctrines to admiralty tort liability in the wake of *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975). This is not the case. A review

of the relevant law from the circuits since *Reliable Transfer* reveals near unanimity with regard to the applicability of the superseding cause doctrine in admiralty cases. Moreover, the only post-*Reliable Transfer* case cited by Petitioners in support of their argument for a conflict among the circuits, *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), contains unique factual circumstances and is actually silent with respect to superseding cause. Rather, that court focused its analysis on shared negligence and the separate question of plain intervening cause.

#### A. The Fifth, Eighth And Ninth Circuits Have Affirmed The Doctrine Of Superseding Cause.

In the twenty years since *Reliable Transfer*, and more particularly, in the last decade or so, the three circuits that have reviewed the issue, the Fifth, Eighth and Ninth Circuits, have unambiguously affirmed the doctrine of superseding cause in the context of maritime tort law.

In *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455 (5th Cir. *en banc*), cert. denied, 469 U.S. 832, 105 S. Ct. 120, 83 L.Ed.2d 63 (1984), the owners of a vessel damaged as a result of a collision with an unmarked sunken barge brought suit against the barge's owners, the United States and the alleged upriver tortfeasors whose initial negligence had resulted in the sinking of the barge three years earlier. The district court dismissed the alleged upriver tortfeasors from the action on a motion for judgment on the pleadings, holding that the alleged failure by the barge's owners or the United States to mark the wreck was, as a matter of law, the superseding and thus sole proximate cause of the damage to the vessel. The Fifth Circuit reversed, holding that a failure to mark the wreck



did not, *per se*, supersede the liability of the original upriver tortfeasors. In so holding, however, the appellate court specifically upheld the concept of superseding cause and noted the relevant factors for determining when an intervening force supersedes prior negligence:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

*Nunley*, 727 F.2d at 464 (quoting *Restatement (Second) of Torts*, Section 442.)

The *Nunley* court went on to cite Section 447 of the *Restatement* in distinguishing plain intervening cause, which does not act to extinguish a prior tortfeasor's liability, from superseding cause:

The fact that an intervening act of a third person is negligent in itself or is done in a negligent

manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

(a) the actor at the time of his negligent conduct should have realized that a third person might so act, or

(b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, or

(c) the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent.

*Id.* at 464-65 (quoting *Restatement (Second) of Torts*, Section 447).

The Court of Appeals concluded that although the failure of other parties to mark a wreck caused by another tortfeasor may in some instances be a superseding cause of a subsequent collision, such a fact-specific determination could not be decided in a judgment on the pleadings. See also *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992) (reaffirming, in a maritime product liability action, the continued vitality of the superseding cause doctrine in the Fifth Circuit following *Nunley*).

In *Lone Star Indus. v. Mays Towing Co., Inc.*, 927 F.2d 1453 (8th Cir. 1991), the Eighth Circuit likewise found no inconsistency between the doctrines of comparative fault, as applied by this Court in *Reliable Transfer*, and superseding cause:

The application of superseding cause, whether in terms of legal cause or cause in fact, is logically antecedent to application of comparative



fault. If the court can apply the doctrine of superseding cause to apportion injuries to separate causes based on the evidence, there is no need for the doctrine of comparative negligence. Thus, even though an actor's negligence may be a cause in fact of injury, superseding cause can operate as a rule of law to preclude legal cause. The question of apportioning fault is not reached.

*Id.* at 1459 (citing T. Schoenbaum, *Admiralty & Maritime Law*, Sections 4-8 at 139 & n.8 (1987); *Prosser & Keeton on Torts*, Section 44 at 301; *Restatement (Second) of Torts*, Section 431; and Note, *Last Clear Chance in Admiralty: A Divided Doctrine*, 66 *Tex.L.Rev.* 133, 153 (1987)).

The plaintiff in *Lone Star* sued a towing company for the sinking of the plaintiff's barge. The district court found on the basis of *res ipsa loquitur* that a crack in the stern of the barge was the result of the towing company's negligence. The district court, however, also found that the plaintiff contributed to the loss of the barge by virtue of its acts during and prior to unloading, specifically its failure to inspect the stern compartment before the section with the crack became submerged. This reduced the plaintiff's damages accordingly. On appeal, the Eighth Circuit found that the plaintiff's negligence was not just a contributing cause of the barge's sinking, but the superseding cause.

The appellate court's finding was based on two of the factors enumerated in the *Restatement*: (1) the barge owner's intervening negligence brought about a harm – sinking – different in kind than what would otherwise have occurred – the barge incurring a fracture in its stern log; and (2) the barge owner's negligent failure to inspect was not a normal result of the situation created by the

negligence of the towing company. The defendant towing company was thus relieved of all liability for the loss of the barge. *Lone Star*, 927 F.2d at 1459-60.

The other circuit to consider and affirm the continuing viability of the superseding cause doctrine after *Reliable Transfer* is the Ninth Circuit. In addition to the instant case, there have been two others affirming the applicability of the superseding cause doctrine in the admiralty tort context: *Protectus Alpha Nav. v. N. Pacific Grain Grow.*, 767 F.2d 1379 (9th Cir. 1985) and *Hunley v. Ace Maritime Corp.*, 927 F.2d 493 (9th Cir. 1991).

In *Protectus Alpha*, in the midst of a fire on a vessel moored to a pier, the terminal operator cast off the burning vessel. This prevented any further firefighting efforts. The Court of Appeals held that the terminal operator's conduct was the sole legal cause of the damage to the vessel that occurred after she was cast off, superseding any negligence on the ship's part that may have originally caused the fire. *Protectus Alpha*, 767 F.2d at 1384. The appellate court arrived at its result through application of the principles memorialized in the *Restatement (Second) of Torts*, Section 442 and a determination that the terminal operator's conduct in setting the burning ship adrift had been "grossly negligent" and thus "culpable to a serious degree." *Id.*

In *Hunley*, the owners of two colliding vessels were sued for injuries to a crewman from a third vessel who was injured during a rescue attempt. The Ninth Circuit affirmed the district court's finding that the failure of one of two colliding vessels to render assistance was the superseding and thus sole legal cause of the crewman's injuries. The court found that the failure of the crew of

the colliding vessel to render assistance was "extraordinarily negligent" within the meaning of Section 447 of the *Restatement (Second) of Torts*. *Hunley*, 927 F.2d at 497.

Both the *Hunley* and *Protectus Alpha* cases involved factual findings of "gross" or "extraordinary" negligence, findings similar to those arising from the circumstances in the instant case. The District Court found Captain Coyne to have acted negligently and in violation of maritime industry standards in five separate instances (CL 36) and to have been not merely negligent, but grossly negligent in his failure to fix and plot the EXXON HOUSTON's position for more than 90 minutes, and in his ill-conceived turn toward shore. (CL 37, 38.) These conclusions underscore the fact that Captain Coyne's errors were the sole proximate cause of the EXXON HOUSTON's grounding, the alleged negligence of any other parties being well remote in both time and place.

**B. The Eleventh Circuit Has Never Directly Reviewed Superseding Cause After *Reliable Transfer* And Its One Related Case Has Unique Facts.**

Against this backdrop of six cases from three circuits that have unambiguously affirmed the continued vitality of the superseding cause doctrine in the admiralty tort context, Petitioners seek to use a single holding from the Eleventh Circuit as evidence of a supposedly momentous rift among the circuits. That case, *Hercules*, 765 F.2d 1069, does not even explicitly reject the principle of superseding cause. To the contrary, *Hercules* never reaches nor discusses the concept. Thus, Respondents respectfully submit that *Hercules* is, at most, ambiguous with respect to the Eleventh Circuit's position on superseding cause.

In *Hercules*, a stevedoring company appealed from a district court judgment holding it liable for 35% of the damages suffered by a cargo owner whose shipment of telephone poles was lost when the barge carrying the poles capsized. The stevedoring company argued that even assuming it had been negligent in loading the poles, as found by the district court in the case, the true cause of the capsizing was the unseaworthiness of the barge and the failure of the barge owner and towing company to correct problems with the load during the voyage when the barge began to list. The stevedoring firm argued that under the doctrines of intervening negligence and last clear chance, its negligence was "too remote" to give rise to liability for loss of the cargo. *Id.* at 1075.

The Eleventh Circuit disagreed with the stevedoring company, concluding that under a "proportional fault" system as adopted by this Court in *Reliable Transfer*, no justification existed for applying the doctrines of *intervening negligence* (not superseding cause) and last clear chance:

Unless it can be truly said that one party's negligence did not in any way contribute to the loss, complete apportionment between the negligent parties, based on their respective degrees of fault, is the proper method for calculating and awarding damages in maritime cases.

*Hercules*, 765 F.2d at 1075.

Interestingly, the Eleventh Circuit explicitly ruled that the stevedoring company's negligence was a proximate cause as well as a cause in fact of the loss of the cargo:

Stevens also argues that its negligence was not a proximate cause of the capsizing. The evidence is undisputed that the shifting of the cargo caused



the barge to develop the severe port list. . . . According to the court below, Detco's and Hercules' attempts to correct for the port list, coupled with the subsequent reshifting of the cargo to starboard, led to the capsizing. The court specifically found that "[t]he excessive load and its too high center of gravity and the improper lashing contributed to the casualty." We see no reason to disturb these factual findings.

*Id.* at 1075, n.11.

Thus, as the Ninth Circuit noted in its opinion below in the instant case, it is not entirely clear whether the Eleventh Circuit meant simply to reject the doctrine of "normal intervening cause" as defined by the *Restatement (Second) of Torts*, Section 443, or whether it also meant to reject "superseding cause" as defined by Section 440 of the *Restatement*. Given the Eleventh Circuit's reliance on the district court's factual findings in *Hercules*, and the appellate court's refusal to disturb those factual findings, it is possible that the appellate court might not have ruled out a defense based on superseding cause had the facts supported a finding that such cause was the sole proximate cause of the damages in question, as was the case with Captain Coyne's gross negligence.

It is also worth noting that the Eleventh Circuit prefaced its rejection of intervening cause in *Hercules* with the words "[u]nless it can truly be said that one party's negligence did not in any way contribute to the loss. . . ." *Hercules*, 765 F.2d at 1075. Exactly what the Eleventh Circuit meant by these words is unclear. However, the textbook definition of the cause of action for negligence includes within its elements: (1) a duty; (2) breach of that duty; (3) causation, including both cause in fact and proximate or legal cause; and (4) damages. If proximate cause is

lacking because a party's allegedly tortious conduct is too remote in relation to the injury complained, it might "truly be said that [the] party's negligence did not in any way contribute to the loss[.]" *Id.*

Moreover, the holding in *Hercules* is clearly dependent on the facts of that case as found by the district court. In the instant case, the District Court found, after hearing all the witnesses and weighing all the evidence, that Captain Coyne's "extraordinary negligence" (as evidenced by a series of errors and omissions) was the sole proximate cause of the grounding of the EXXON HOUSTON. (CL 44.) The undisturbed findings of fact in *Hercules*, however, when weighed against the factors specified in the *Restatement*, apparently would not support a finding of superseding cause. Accordingly, the Eleventh Circuit did not have to reach the question of whether the doctrine of superseding cause remains viable in the admiralty tort context.

### C. The Virtual Uniformity Of The Decisions On Point Does Not Justify Certiorari.

From this overview, it appears clear that there is virtual uniformity among the circuits and that there is no need to grant certiorari. As one notable authority on federal appellate practice has observed, differences between the circuits that "can fairly be accounted for on the basis of variations in the factual situations among the cases involved" will generally not provide a sufficient basis for review by this Court. See 13 *Moore's Federal Practice*, ¶ 810.21 (1995) (citing Harlan, *Manning the Dikes*, 13 Record of N.Y.C. Bar Ass'n 541, 551 (1958)). The result reached by the Eleventh Circuit in *Hercules* turned on the trial court's unique findings of fact in that case, showing



shared responsibility, not sole negligence as found by the district court here. Thus, insofar as *Hercules* can be construed to illustrate a difference among the circuits, it is a difference that "can fairly be accounted for on the basis of variations in the factual situations among the cases involved." Accordingly, review by this Court is not warranted.

## II. PETITIONERS' ALLEGED CONFLICT AMONG THE CIRCUITS ON THE IMPACT OF INTERVENING NEGLIGENCE ON LIABILITY FOR BREACH OF ADMIRALTY WARRANTIES IS ILLUSORY

### A. There Is No Conflict Among The Circuits Regarding The Impact Of Intervening Negligence On Liability For Breach Of Admiralty Warranties.

Petitioners' reliance on the opinions of the Court of Appeals for the Second Circuit in *Paragon Oil Co., Inc. v. Republic Tankers, S.A.*, 310 F.2d 169 (2nd Cir. 1962), cert. denied, 372 U.S. 967, 83 S. Ct. 1092, 10 L.Ed.2d 130 (1963) and *International Ore & Fertilizer Corp. v. SGS Control Services, Inc.*, 38 F.3d 1279 (2nd Cir. 1994), to somehow establish a conflict with the decision below of the Court of Appeals for the Ninth Circuit in the instant case with regard to the application of intervening and superseding negligence in admiralty breach of warranty actions is misplaced. *Paragon Oil* is in accord with the Ninth Circuit's decision below and *International Ore* appears to establish only a conflict within the Second Circuit itself and not between circuits.

In *Paragon Oil*, the Second Circuit Court, in observing that "one liable for violating a safe berth clause 'may lessen the amount of damages for which he is responsible

by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damages,' " quoted an excerpt from *Constantine & Pickering S.S. Co. v. West India S.S. Co.*, 199 F. 964 (S.D.N.Y. 1912). That excerpt, however, when quoted in its entirety, reveals the following:

Upon this breach of contract libellant rests, and up to a certain point rightly; but even a tortfeasor may lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damages. . . . The same principle applies here.

*Id.* at 967-68 (citations omitted) (emphasis added).

Thus, contrary to Petitioners' contention, the Second Circuit recognized in *Paragon* and *Constantine & Pickering* that in cases involving a breach of an admiralty contract, the principle of contributory negligence is applicable. In *International Ore*, 38 F.3d 1279, however, the Second Circuit Court noted, without authority, that contributory negligence would be irrelevant in a claim grounded solely in contract. *Id.* at 1286. *International Ore*, therefore, appears to be in conflict with *Paragon* and *Constantine & Pickering* which, in turn, support the Ninth Circuit's conclusion that the principle of intervening or superseding cause applies in contract and tort cases.

This Court's opinion in *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 84 S. Ct. 748, 11 L.Ed.2d 732 (1964), does not compel a different conclusion. The issue before this Court in *Italia Societa* was whether the shipowner-indemnitee was required to prove negligence on the part of the stevedore-indemnitor in order to invoke an indemnity provision in

a service contract. In that case, the stevedore's alleged breach of an implied warranty of workmanlike performance resulted in injury to one of the stevedore's longshoreman employees, who then brought a claim against the shipowner for negligence and unseaworthiness. *Italia Societa*, 376 U.S. at 317. This Court held that the shipowner-indemnitor was not required to prove that the stevedore-indemnitee was negligent in order to establish the stevedore-indemnitee's liability for contractual indemnity.

In this case, however, Petitioners allege that HIRI breached a warranty of safe berth which resulted in injury to Petitioners and not to a third party. There is no claim for indemnity within these proceedings and, therefore, *Italia Societa* is inapposite.

In *Italia Societa*, this Court did not address the issue of the effect of intervening or superseding cause on a breach of warranty claim. In fact, causation of the injury arising from the breach of the stevedore's warranty was not at issue in that case. Thus, *Paragon, International Ore*, and *Italia Societa* simply do not demonstrate a conflict among the circuits regarding the application of the concept of intervening or superseding cause in breach of admiralty warranty cases.

**B. The Law Of Contracts Recognizes The Application Of Intervening Or Superseding Cause In Breach Of Warranty Claims.**

*Comment a.* of the *Restatement (Second) of Contracts*, Section 351 (1981), notes that "the requirement of foreseeability [for contract damages] is a more severe limitation of liability than is the requirement of substantial or 'proximate' cause in the case of an action in tort or for

breach of warranty." Thus, the *Restatement (Second) of Contracts* specifically recognizes that in breach of warranty actions, the tort principles of proximate cause applies.

Furthermore, *Corbin's on Contracts* provides as follows:

One of the rules most commonly laid down is that damages are not recoverable for injury that is too remote from the conduct of the defendant constituting his breach of duty. Another form of the rule is that damages are not recoverable for losses suffered or gains prevented unless the requirements of the law as to "proximate" causation are satisfied. *The form of this rule is the same whether it is being applied in the field of contracts or in the field of torts[.]*

5 *Corbin's on Contracts*, Section 997 (1964) (emphasis added).

Intervening cause or superseding cause is but one element in the determination of whether proximate or legal cause exists. See *Restatement (Second) of Torts*, Section 431.<sup>3</sup> Respondents therefore respectfully submit that the

<sup>3</sup> The actor's negligent conduct is a legal cause of harm to another if

- (a) his conduct is a substantial factor in bringing about the harm, and
- (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

*Restatement (Second) of Torts*, Section 431 (emphasis added).

*Comment d.* to Section 431 notes that "[t]here are certain rules which operate to relieve a negligent actor from liability because of the manner in which his negligence produces it, even though his negligent conduct is a substantial factor in bringing it about. These rules are stated in §§ 435-461." *Id.* at 430, *Comment d.*



principle of intervening or superseding cause is clearly applicable in a breach of warranty claim.

**C. Petitioners Cannot Prevail Even If The Principle Of Intervening Or Superseding Cause Is Not Applied.**

Even assuming that the principle of intervening or superseding cause is not applied in a breach of warranty claim, Petitioners still cannot prevail. In a breach of contract action, a breaching party "is not . . . liable in the event of breach for loss that he did not at the time of contracting have reason to foresee as a *probable* result of such a breach. The mere circumstance that some loss was foreseeable, or even that some loss of the same general kind was foreseeable, will not suffice if the loss that actually occurred was not foreseeable." *Restatement (Second) of Contracts*, Section 351, *Comment a*.

The District Court in the instant case found that Captain Coyne's attempt to turn the ship toward the coast instead of away from it was not a foreseeable consequence of the breakout. (CL 45(b).) The District Court further concluded that Captain Coyne's decision to make the final turn was not foreseeable. (CL 45(c).) These findings and conclusions have not been challenged by Petitioners. Thus, even under contract law, the actions of Exxon's Captain Coyne precluded Petitioners from recovering on any alleged breach of warranty by HIRI.

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*Comment e.* to § 431 further notes that "[a]lthough the rules stated in this Section are stated in terms of the actor's negligent conduct, they are equally applicable where the conduct is intended to cause harm, or where it is such as to result in strict liability." *Id.* at 430, *Comment e*.

**III. BIFURCATION OF THE TRIAL BY THE DISTRICT COURT WAS APPROPRIATE.**

**A. Bifurcation Was Not Violative Of The Doctrines Established In *Reliable Transfer*.**

Petitioners argue that the bifurcation of the litigation into two parts (the time period before and including the breakout, and the time period following the breakout and until the grounding) was improper. Because the bifurcation resulted in a trial focused solely on the time period after the breakout, Petitioners argue that evidence relating to the cause of the breakout itself was improperly excluded, in violation of the dictates of *Reliable Transfer*. Petitioners argue that the breakout itself was a contributing cause of the ultimate grounding. Therefore, the exclusion of evidence supportive of Petitioners' theories of negligence causing the breakout precluded the apportionment of total fault contributing to the grounding.

That was not the case. The breakout and the ultimate grounding were two easily distinguishable and separate events, each having not so easily distinguishable elements of causation. The bifurcated trial could have resulted in a finding that the event of the grounding was not solely caused by Captain Coyne's negligent navigation. The trial court might have found that the event of the breakout was in some way a contributing cause of the event of the ultimate grounding. Had that been determined, a percentage of fault contributing to the grounding might have been assigned by the trial court to the event of the breakout. At that point, a Phase II trial would have allowed still further apportionment of faults contributing to the event of the breakout.

However, the trial court found Captain Coyne's negligence to be the sole cause of the grounding. Therefore, the cause of the breakout was no longer material to an



analysis of the cause of the grounding. Not only was the Bifurcation Order proper, it served its intended purpose of streamlining the litigation, without contradicting the dictates of *Reliable Transfer*.

**B. Bifurcation Did Not Deny Petitioners Due Process.**

Exxon's contentions that the district court's bifurcation "severed the unseverable" (Petition for Writ of Certiorari at p. 29) and prevented it from introducing evidence establishing Respondents' liability for breaches of warranties and tort, thereby depriving it of due process, are untenable. As stated by the Ninth Circuit Court of Appeals, Petitioners were incorrect in arguing that "the issues of causation, from breakout to grounding, are inseverable" and that the district court, by bifurcating the trial, denied Petitioners due process and deprived it of a fair trial. Respondents can do no better than to repeat what the Ninth Circuit concluded:

The district court assumed at the outset of Phase One that the defendants' negligence was a cause in fact of the grounding. There was thus no need in Phase One for Exxon to establish HIRI's fault in causing the breakout. Rather, Exxon had the burden of proving that the forces set in motion by the breakout were the proximate cause of the grounding. HIRI had the burden of showing by a preponderance of the evidence that Captain Coyne's actions subsequent to the breakout were the sole proximate or superseding cause of the grounding of the vessel, such that the defendant parties were relieved of liability for the *Houston's* loss.

... After a lengthy bench trial, the district court found that Captain Coyne's extraordinary negligence was the sole proximate cause of the

grounding of the *Houston*, obviating any need to make a comparative analysis of fault regarding the loss of the ship. "The principles of comparative negligence are not applicable when damages can be apportioned to separate causes based on evidence in the record." *Protectus Alpha*, 767 F.2d at 1383.

Opinion, United States Court of Appeals of the Ninth Circuit, Appendix A, at App. 16-17.

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**CONCLUSION**

Because there is no conflict among the circuits significant enough to warrant a review by this Court, either with regard to the underlying tort claims or the underlying contractual claims, and because the District Court's bifurcation is consistent with *Reliable Transfer* and not violative of due process, there is no policy reason, no uniformity reason, or any other "special and important reason" for this Court to grant certiorari. Therefore, certiorari should be denied.

Dated: October 20, 1995

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In The  
**Supreme Court of the United States**  
October Term, 1995

EXXON COMPANY, U.S.A.;  
EXXON SHIPPING COMPANY,

*Petitioners,*

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.;  
HAWAIIAN INDEPENDENT REFINERY, INC.;  
PRI MARINE, INC.; PRI INTERNATIONAL, INC.,

*Respondents,*

v.

GRIFFIN WOODHOUSE, LTD.,  
BRIDON FIBRES AND PLASTICS, LTD.,

*Third-Party Respondents.*

On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

**PETITIONERS' REPLY TO RESPONDENTS'  
AND THIRD-PARTY RESPONDENTS' JOINT BRIEF  
IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI**

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## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Contrary to respondents' arguments, the decision below is irreconcilable with the admiralty policies established by this Court. The conflicts among the circuits about the effect of a shipowner's negligence upon a defendant's liability for breach of admiralty warranties and for liability in tort are very real and very important to the merchant shipping industry. Those conflicts cannot be erased by contending that all of the other cases are factually distinguishable. This Court's admiralty principles do not change because the precise facts of each case to which they are applicable may vary. Otherwise, the Court could not establish admiralty law binding upon the Nation upon which domestic and foreign shipowners can rely.

The opinion below disregards this Court's admiralty policy. Admiralty policy applied to products liability, negligence, and breach of warranty actions imposes liability on the party best situated to take safety measures to reduce the likelihood of injury. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 866, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986); *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 405 n.11, 95 S. Ct. 1708, 44 L. Ed. 2d 251 (1975); *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co., Inc.*, 376 U.S. 315, 324, 84 S. Ct. 748, 11 L. Ed. 2d 732 (1964). Neither petitioners (hereinafter "Exxon") nor the HOUSTON's Captain had any control over the SPM or the dangerously defective equipment furnished by the respondents that created the hazards of stranding for every tanker moored there and danger to Oahu's environment as well. The respondents, not Exxon, were in the best position to make the SPM and its equipment safe, and they took no steps to do so.

### Constitutional Error

Contrary to respondents' arguments (Resp. Br. at 27-29), neither constitutional error nor disobedience of



*Reliable Transfer* and *Italia Societa* arose simply from the district court's initial bifurcation order. Exxon was denied a fair trial by the combination of the bifurcation order plus the court's later orders plus entry of judgment against Exxon which continued to foreclose it from ever proving its liability case-in-chief.

Respondents led the lower courts into error by persuading them that the common-law doctrine of superseding cause is applicable in admiralty to exonerate them from all liability for loss, even though they had conceded that their own conduct was a cause-in-fact of the casualty. In fact and in admiralty law, causation was no longer in issue after their concession. The only question was whether, as a matter of legal policy, an act or event that intervened after their own egregious misconduct should shift the entire liability to Exxon. Contributory negligence has not relieved an admiralty defendant from tort liability since this Court decided *The Max Morris*, 137 U.S. 1, 14-15, 11 S. Ct. 29, 34 L. Ed. 586 (1890). Only in the Ninth Circuit does contributory negligence of a plaintiff exonerate a defendant from liability for breach of an admiralty warranty.

#### Intercircuit Conflict

1. Relying on this Court's decision in *Reliable Transfer*, the Eleventh Circuit has held that the common-law doctrine of superseding cause cannot exonerate an admiralty defendant for liability for negligence. *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069, 1075-76 (11th Cir. 1985). The Ninth, Eighth and Fifth Circuits have reached a contrary conclusion. E.g., *Exxon Co. v. SOFEC, Inc.*, 54 F.3d 570, 573-75 (9th Cir. 1995); *Lone Star Indus., Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1459 (8th Cir. 1991); *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992).

2. The superseding cause doctrine is applicable to exonerate a defendant from liability for breach of admiralty warranties in the Ninth Circuit. *Exxon Co.*, 54 F.3d at 575-76. The Second Circuit reaches the opposite result.

*International Ore & Fertilizer Corp. v. SGS Controlled Services, Inc.*, 38 F.3d 1279 (2d Cir. 1994); *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173-74 (2d Cir. 1962), cert. denied, 372 U.S. 967, 83 S. Ct. 1092, 10 L. Ed. 2d 130 (1963).

#### RESPONDENTS' COUNTERSTATEMENT OF THE CASE IS INACCURATE

Petitioners mention only a few of the instances in which respondents' brief distorts the facts. Contrary to respondents' "perspective" (Resp. Br. at 3), the HOUSTON's fatal voyage did not begin at the SPM, but from the mainland; the vessel would not have gone to Oahu without the HIRI respondents' warranty of safe berth to protect Exxon's tanker and her cargo. Neither Exxon's prior uneventful moorings at the SPM nor contractual acceptance of HIRI's designating that mooring is relevant. (*Ibid.*) Before the tanker left the mainland, the HIRI respondents had actual knowledge (and Exxon did not) that the mooring was unsafe; their own experts had warned them that breakouts were inevitable unless they took recommended safety measures, which the HIRI respondents ignored. The HIRI respondents also knew (and Exxon did not) that two tankers had broken away before they warranted the SPM's safety. All of the respondents had actual or imputed knowledge (and Exxon did not) that the mooring equipment was dangerously defective.

Respondents boldly tell this Court that their acts and omissions before the HOUSTON's breakout are none of this Court's business. (Resp. Br. at 4.) Of course they are. Courts cannot decide what risks a defendant must voluntarily assume or are imposed by law when he breaches a contract without knowing the terms of the contract and the facts constituting the breach; neither can courts decide what risks a defendant voluntarily or involuntarily assumed when he commits a tort without the

court's knowing the legal duties created by the relationships between the parties and the nature of the breach of those duties. Those facts dictate the applicable legal principles for deciding liability.

The hazard of the HOUSTON's stranding was one of the risks that the HIRI respondents assumed when they breached their warranty of safe berth; breach of express and implied admiralty warranties imposes strict liability. Respondents also were required to accept the risk of stranding when they furnished Exxon with dangerously defective mooring equipment; strict product liability for those defects also applied.

In either contract or tort, it is immaterial whether the HOUSTON's Captain responded calmly or anxiously to the perils in which the respondents' breaches of duty placed the HOUSTON (Resp. Br. at 5), or whether the Captain's choice in ordering the tanker turned was wrong from a hindsight point of view (Resp. Br. at 10-12). Respondents' statement that "just 35 minutes after the breakout . . . , the cargo hose was under the positive control of the NENE; control the NENE did not relinquish until after the stranding" (Resp. Br. at 7) is contradicted by the indisputable facts that shortly before the Captain ordered the final turn, the hose caused the crane to collapse which injured the crane operator, threatened serious injury to the entire deck crew, and threatened potential destruction of the tanker by explosion.

Respondents cannot deny that the HOUSTON was crippled by the trailing hose from the breakout until moments before stranding or that the hose would not have trailed if the HIRI respondents had not removed the quick-release safety devices before the breakout, contrary to the advice of their own experts. They cannot deny that the lines parted which were supposed to have secured the HOUSTON to the SPM, thereby casting her adrift.

# **I. THE DISTRICT COURT'S ORDERS FORECLOSING EXXON FROM EVER PROVING ITS LIABILITY CASE-IN-CHIEF DEPRIVED EXXON OF DUE PROCESS AND VIOLATED THIS COURT'S APPLICABLE ADMIRALTY POLICIES**

Respondents convinced the district court that judicial time and further discovery could be saved by trying solely the Captain's conduct *after* the breakout and by foreclosing Exxon from producing any of its evidence of respondents' egregious breaches of duty *before* the breakout. Respondents argued that by trying only the Captain, the court could potentially resolve the whole case because if it found the Captain was grossly negligent and that his negligence was a superseding cause of the casualty, none of the respondents would have any liability. The Court accepted the argument over Exxon's strenuous objections; Exxon was permitted only to make a brief offer of proof with respect to its entire case-in-chief.

Exxon nevertheless hoped that it would be able to offer evidence on its liability case in the anticipated second phase of the trial. That expectation was thwarted because the district court concluded that the Captain's navigation of the stricken tanker was extraordinarily negligent and relieved respondents of all liability at the conclusion of the first phase of the case. No damages issues were ever reached. The district court entered judgment against Exxon as if none of the respondents' multiple breaches of duty to Exxon before the breakout had anything to do with liability. The court disregarded the indisputable facts that the navigability of the tanker was severely restricted by the trailing cargo hose and that hose would never have broken or trailed if the safety devices had been in place. The hose created severe danger to the vessel and her crew. That hose, then trailing from the NENE, reduced the navigation choices as late as the moment when the Captain issued his final order to turn the tanker.



The curtain on this maritime drama did not rise for the first time when the tanker was cut adrift from the mooring. The rights and duties of the HIRI respondents arose when Exxon executed its contract with them to sell them a tanker of crude oil for delivery at the SPM. The contract contained a specially negotiated safe berth warranty in Exxon's favor. The warranty was breached before the HOUSTON left the mainland because the respondents had actual knowledge that the berth was unsafe when the warranty was executed. The HIRI respondents also owed Exxon a duty of reasonable care when the vessel was moored at their SPM which they breached because they knew (1) that SPM failures were inevitable, (2) that two tankers had broken away before the HOUSTON reached Oahu, (3) that their mooring masters had not been trained to manage stricken tankers after a breakout, (4) that they had no assist vessels powerful enough to assist a stricken tanker, and (5) that they had removed the safety devices from the cargo hoses and replaced them with heavy bolts that were the antithesis of quick release mechanisms when the SPM failed. All of the respondents knew or were chargeable with knowledge that the equipment furnished to Exxon at the mooring was dangerously defective.

The district court's foreclosure orders and ultimate judgment, affirmed by the Ninth Circuit, prevented Exxon from proving that respondents were liable for the loss of the vessel even if the court had correctly found that the Captain's navigation was grossly negligent. His negligence did not relieve respondents from liability for either breach of admiralty warranties or strict products liability. The same orders and judgment prevented the lower courts from ever comparing the Captain's fault with the fault of respondents as required by *Reliable Transfer* because their serious misconduct occurred before the breakout.

## II. THE CIRCUITS ARE IN CONFLICT ON THE APPLICATION OF SUPERSEDING CAUSE AFTER RELIABLE TRANSFER

The Fifth, Eighth and Ninth Circuits hold that the common law doctrine of superseding cause applies in admiralty cases to exonerate the defendants from liability for negligence after *Reliable Transfer*. *Lone Star Indus., Inc.*, 927 F.2d at 1459; *Donaghey*, 974 F.2d at 652-53 (relying on *Lone Star Indus.*); *Protectus Alpha Navigation Co., Ltd. v. N. Pacific Grain Growers, Inc.* 767 F.2d 1379, 1384 (9th Cir. 1985); *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497-98 (9th Cir. 1991).

*Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069, 1075-76 (11th Cir. 1985) reached the opposite conclusion.<sup>1</sup>

## III. THE NINTH CIRCUIT IS IN CONFLICT WITH THE SECOND CIRCUIT IN APPLYING TORT PRINCIPLES TO BREACH OF ADMIRALTY CONTRACTS

The Second Circuit follows the usual contract rule that a breaching party is not excused from liability by negligence of the non-breaching party. *International Ore & Fertilizer Corp.*, 38 F.3d at 1286; *Paragon Oil Co.*, 310 F.2d at 173-74; *Venore Transp. Co. v. Oswego Shipping Corp.*, 363 F. Supp. 1366, 1370 (S.D.N.Y. 1973), *modified on other grounds*, 498 F.2d 469 (2d Cir.), *cert. denied*, 419 U.S. 998, 95 S. Ct. 313, 42 L. Ed. 2d 272 (1974). *See also Ore Carriers of Liberia, Inc. v. Navigen Co.*, 435 F.2d 549, 550-51 (2d Cir. 1970).

In our case, the Ninth Circuit held that the Captain's negligence exonerated respondents from all liability for

<sup>1</sup> Taking their cue from the opinion below, respondents argue that *Hercules, Inc.* may not be contrary because the court may only have rejected the doctrine of "normal intervening cause," not superseding cause. The suggestion does not make legal sense. Common-law "normal intervening cause" has no effect on liability; there was nothing to reject.



breach of their warranty of safe berth. Damage issues were never reached. As this Court explained in *Italia Societa*, a shipowner's negligence in tort does not defeat liability for breach of an admiralty warranty. *Italia Societa*, 376 U.S. at 321. After cause-in-fact has been conceded, the question is not whether the breach caused a shipowner's injury, but whether the shipowner's negligence, if any, constituted a failure to mitigate damages. This Court has not transferred concepts of legal (or "proximate") cause in common-law negligence cases to admiralty actions for breach of warranty. *Ibid*.

Respondents' brief confuses issues of liability with issues of damages. (Resp. Br. at 22-23.) The respondents fail to recognize that their quotation from *Paragon Oil Co.*, 310 F.2d at 173-74 states the principle of mitigation of damages, not a principle applied to decide liability in an action for breach of contract.<sup>2</sup> Contributory negligence is not a defense to liability for breach of warranty.

"Foreseeability" in contract law imposes limits on recoverable damages. Since *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 45 (1854) was decided, general damages recoverable for breach of contract are confined to those which actually arise from the breach or which might have been contemplated or foreseen by reasonable persons as the probable result of a breach when the contract was made. That is the very point made by the authorities cited by respondents on the role of foreseeability. (Resp. Br. at 24-25.)

Likewise within the contemplation of a reasonable person when a warranty of safe berth is negotiated is that the vessel subject to the warranty may ground and her

<sup>2</sup> Contrary to respondents' argument, contributory negligence has never been a liability defense in admiralty warranty cases. In negligence cases, after *The Max Morris* and before *Reliable Transfer*, contributory negligence triggered divided damages; post-*Reliable Transfer*, contributory negligence requires comparing degrees of fault.

cargo may be lost if a safe berth warranty is breached. Reasonable people in the maritime trade who have negotiated a safe berth warranty are also aware that, when the warranty is breached, the masters of vessels in dangerous circumstances may not respond with the quality of seamanship that may seem appropriate to the warrantor or his experts from a defensive hindsight point of view.

The foreseeability concept applicable in ordinary contract cases, as well as in cases involving breach of admiralty warranties, is that "[n]o particular degree of remoteness in time or space, and no maximum number of intervening events, has ever been established as a dead line [sic] after which damages are not recoverable." 5 *Corbin on Contracts*, § 997, p. 20 (1964). When the captain of a vessel is actually negligent and when his negligence has contributed to the loss of the vessel or her cargo, the warrantor of safe berth is not relieved from liability. Instead, the damages due the non-breaching party from the breaching party are reduced to take into account the failure of the non-breaching party to mitigate damages.

Similarly in admiralty actions based on tort, contributory negligence is one of the faults to be compared in determining damages. Thus, in *Reliable Transfer* itself, the captain of the vessel that grounded was grossly negligent. He made a dangerous turn to pass a barge astern under dangerous conditions. He thereafter headed eastward believing that the vessel was headed toward open sea when, in fact, he was approaching a breakwater on which he later grounded. The breakwater had ordinarily been marked by a flashing light maintained by the Coast Guard, but the Coast Guard had negligently failed to maintain the light. Although the captain was exceedingly negligent and the Coast Guard was only ordinarily negligent, the district court and the Court of Appeals were compelled to apply the then-existing divided damages rule. This Court overturned the old rule in favor of comparative negligence because it was very unfair to compel equal division of damages when faults involved were

grossly unequal and when proportionate degrees of fault could be measured and determined on a rational basis. *Reliable Transfer Co.*, 421 U.S. at 405-406.

Here, the rational basis for determining comparative fault was destroyed when the district court prevented Exxon from proving any of respondents' faults before the breakout itself.

### CONCLUSION

The decision below cannot be reconciled with the controlling admiralty policies established by this Court, with the decisions of other circuits, or with the fair trial standards that are embodied in the Due Process Clause.

Dated: October 31, 1995

Respectfully submitted,

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(4)  
No. 95-129

**In The  
Supreme Court of the United States**

**October Term, 1995**

EXXON COMPANY, U.S.A.;  
EXXON SHIPPING COMPANY,

*Petitioners,*

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.;  
HAWAIIAN INDEPENDENT REFINERY, INC.;  
PRI MARINE, INC.; PRI INTERNATIONAL, INC.,

*Respondents,*

v.

GRIFFIN WOODHOUSE, LTD.;  
BRIDON FIBRES AND PLASTICS, LTD.,

*Third-Party Respondents.*

**On Writ Of Certiorari To The United States  
Court Of Appeals For The Ninth Circuit**

**PETITIONERS' BRIEF ON THE MERITS**

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## QUESTIONS PRESENTED

1. After this Court decided *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), may an admiralty court exonerate defendants from all liability to a shipowner for the loss of its tanker when defendants conceded that their breaches of maritime duties imposing strict liability in tort and negligence were causes-in-fact of the vessel's stranding because the court found that the tanker's captain was grossly negligent in navigating the imperiled vessel?

2. After this Court decided *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964) may an admiralty court exonerate defendants from liability to a shipowner for the loss of its tanker after defendants conceded that their breaches of express and implied warranties were causes-in-fact of the vessel's stranding because the tanker captain was grossly negligent in navigating the imperiled vessel?

## PARTIES

The parties are Petitioners/Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A., a division of Exxon Corporation, Respondents/Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc. and Sofec, Inc., and Respondents/Third-Party Respondents Bridon Fibres And Plastics, Ltd. and Griffin Woodhouse, Ltd. Werth Engineering & Marine, Inc., initially a third-party respondent, was dismissed before trial by stipulation of the parties.<sup>1</sup>

<sup>1</sup> Pursuant to Rule 29.1, Petitioners state that the non-wholly owned subsidiaries and affiliates that have issued public shares in Petitioners are as follows: Sea River Maritime, Inc., successor in interest to Exxon Shipping Company, Compania Minera Disputada de las Condes S.A.; Esso Malaysia Berhad; Esso Societe Anonyme Francaise; General Sekiyu, K.K.; Imperial Oil Limited; Les Docks des Petroles d'Ambes; Societe Francaise Exxon Chemical; Tonen Kabushiki Kaisha.

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## OPINION

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Exxon Shipping Co. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995). A copy of the Slip Opinion is annexed to the certiorari petition as Appendix A ("CP App. A"), and it is reprinted in the Joint Appendix ("JA") at 209, *et seq.*

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## JURISDICTION

The opinion of the court of appeals was filed on April 26, 1995. A timely petition for rehearing was denied by order filed May 24, 1995; a copy of the order is annexed to the certiorari petition as Appendix B ("CP App. B"). The district court's jurisdiction was in admiralty, pursuant to 28 U.S.C. § 1333. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1). Petitioners' Petition for Writ of Certiorari was filed in the Supreme Court on July 24, 1995 (Supreme Court Case No. 95-129). This Court's order granting certiorari was issued on November 22, 1995.

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## CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides, in pertinent part: "No person shall . . . be deprived of . . . property, without due process of law. . . ."

Section 1333 of 28 U.S.C. provides, in pertinent part: "The district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of

admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."

Petitioners (plaintiffs/appellants below) Exxon Shipping Company ("ESC") and Exxon Company, U.S.A. (collectively, "Exxon") filed their certiorari petition on July 24, 1995 seeking review of the judgment entered on March 31, 1994 of the Ninth Circuit affirming a final judgment of the United States District Court for the District of Hawaii, pursuant to Federal Rules of Civil Procedure, Rule 54(b) upon less than all claims and as to less than all parties, against Exxon and in favor of Respondents (respondents/defendants and third-party defendants below): Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc. (related corporations, collectively "HIRI" or "HIRI respondents"), and Sofec, Inc. ("Sofec"), Bridon Fibres and Plastics, Ltd. ("Bridon"), Griffin Woodhouse, Inc. ("Griffin") in Exxon's action in admiralty seeking damages for the loss of ESC's tanker, the EXXON HOUSTON.

## STATEMENT OF THE CASE

### A. Procedural History of the Litigation in the District Court

Exxon filed its complaint in admiralty in April, 1990 alleging that the HIRI respondents breached their express and implied warranties of safe berth, their implied warranty of workmanlike performance with respect to stevedore and terminal operations, and their admiralty duties

imposing liability for negligence and strict product liability causing ESC's constructive total loss of the EXXON HOUSTON ("HOUSTON") and other damages, including the cost of cleaning up oil spills and loss of cargo. (JA 29-41.) Against Sofec, Exxon alleged negligence in the manufacture and sale of the Single Point Mooring System ("SPM"), strict product liability, and breach of the implied warranty of merchantability and fitness for purpose. (JA 41-45.) HIRI and Sofec denied liability and asserted affirmative defenses. (CR 8, 11.)<sup>2</sup>

HIRI filed a third-party complaint against Bridon, Griffin, and Werth Engineering & Marine, Inc., invoking diversity jurisdiction and seeking contribution and indemnity with respect to Exxon's claims on the theory that the third-party defendants had manufactured and supplied the chafe chain that had parted. (CR 13.)<sup>3</sup> Bridon and Griffin filed answers to the third-party complaint and to Exxon's complaint denying liability and asserting affirmative defenses. (CR 30, 33, 55, 138.)

*Pretrial Orders.* On June 3, 1992, Griffin filed a motion to bifurcate the liability issues or to continue the trial date to permit further discovery. (JA 48.) The other respondents joined in Griffin's bifurcation motion. (CR

<sup>2</sup> Throughout this brief "CR" refers to the Clerk's Record; "ER" refers to the Excerpts of Record filed in the Ninth Circuit; "JA" refers to the Joint Appendix filed herewith; and "CP App." refers to the Appendix annexed to the certiorari petition heretofore filed.

<sup>3</sup> Werth was dismissed without prejudice by stipulation of the parties. (CR 165.)



370, 373, 375.) Respondents persuaded the court that the case could be tried as if it were a simple negligence case; they argued that the court would save its own time and themselves money if the court first tried the conduct of the HOUSTON's Captain after HIRI's mooring equipment had failed and the tanker was cast adrift burdened by the broken 840-foot cargo hose bolted to her manifold (the "breakout"). They contended that if the court found that the Captain was negligent in navigating the tanker, it could also find that his negligence was a superseding cause of the loss of the tanker, and the whole case could go away. (7/27/92 RT 6.)<sup>4</sup> To convince the court to try the case upside-down and backwards, respondents conceded that their collective conduct was a cause-in-fact of the stranding ("but for the breakout there wouldn't have been the grounding in this case . . ."). (7/27/92 RT 31.)

Exxon vigorously opposed the motion, arguing that trying the Captain's conduct before Exxon was permitted to put on its case-in-chief would distort causation and disable the court from making the determination of comparative fault required by *Reliable Transfer, Inc.* (JA 51-57, 7/27/92 RT 24.) The district court granted respondents' bifurcation motion on July 31, 1992. (JA 58-75.) Its order stated that "the first phase of the trial will be limited to the issue of causation with respect to . . . [the] HOUSTON's grounding, but not including the issue of

<sup>4</sup> The district judge announced at the threshold of the case that he was unfamiliar with the aspects of admiralty law of this case and that his law clerk would help him because his clerk had served in the United States Navy. (2/11/93 RT 213-14; 3/3/93 RT 127-28.)

causation with respect to the breakout itself." (JA 74; ER 46.)<sup>5</sup> Before testimony was taken, the district court explained that Phase I was designed to permit the court to decide whether the Captain's conduct was so negligent as to become "an overriding" cause of the stranding. The court added: "[Y]ou are going to really confine it to those few minutes - as he gets out toward the last few minutes before the grounding." (2/9/93 RT 50.)<sup>6</sup>

After some further procedural skirmishing, Exxon filed a motion for partial summary judgment against the HIRI respondents in August, 1992 because they breached their express and implied warranties of safe berth when the chafe chain failed. (CR 433, ER 49-50.) The court denied the motion holding that chain failure was a Phase II issue. (CR 538; JA 109.) After the final pre-trial conference on October 9, 1992, the court ruled that PRI International was bound by its express warranty of safe berth, but it declined then to decide whether the other HIRI respondents were also bound by the same warranty. It also expressly declined to decide "whether HIRI is bound

<sup>5</sup> Exxon moved the court to clarify the bifurcation order. (CR 462, ER 73; CR 463, ER 95; CR 473, ER 97-98; CR 482, ER 100-102; CR 485, ER 104.) The court denied the motion. (CR 502, ER 106.)

<sup>6</sup> The court adhered to its interpretation of legal cause throughout the trial: "As stated in the court's July 31, 1992 bifurcation order, in order to prove that the breakout was a proximate cause, 'Exxon would have to show that the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of grounding.' *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982)." Conclusions of Law 8, JA 162. [*Hahn* was a wrongful death action invoking the Federal Tort Claims Act, 28 U.S.C. § 1346(b).]

by the warranty of safe berth, whether the parting of the chafe chain constituted a breach of warranty of safe berth, the scope of the warrantor[s'] or *charterer's* legal obligations pursuant to the warranty of safe berth" because "[t]hese issues . . . need not be resolved in order for the litigants to prepare for the first phase of the bifurcated trial. . . ." [Emphasis added.]<sup>7</sup> (CR 538; ER 132; JA 112-113, n.4.)

The court's October 9, 1992 order prompted Exxon to seek a Rule 16 conference to clarify the evidentiary constraints. Exxon sought to ascertain whether it could introduce its evidence that the HIRI respondents' own expert had warned them that a breakout was inevitable and that Gall Thompson breakaway couplings (quick release safety devices) on the cargo hoses were essential. Exxon pointed out that the removal of the safety devices with which the cargo hoses had been initially equipped and the failure of the HIRI respondents to replace them with Gall Thompson couplings caused the cargo hose to impair severely the navigability of the tanker and was a critical factor in Captain Coyne's decision to order a final turn. The court ruled that the proffered evidence was not admissible in Phase I. (12/8/92 RT 36, ER 159; CR 548.)<sup>8</sup>

<sup>7</sup> Although the Findings of Fact and Conclusions of Law refer to HIRI as a "charterer," HIRI did not charter the HOUSTON.

<sup>8</sup> The district court later ruled at trial that the HOUSTON's Captain could not testify about the effect on the navigability of the tanker after the breakout caused by the lack of breakaway couplings on the cargo hoses. (2/11/93 RT 195.)

*Exxon's Offer of Proof.* When all efforts to change the court's mind about bifurcation failed, Exxon offered to prove that the HIRI respondents knew that the berth was unsafe before the HOUSTON sailed to Hawaii. Before the HOUSTON incident, two different tankers had broken away from the SPM. The HIRI respondents had been repeatedly advised by their own experts that breakaways were inevitable; they nevertheless had removed the quick release couplings with which the cargo hoses had been initially equipped, and they failed to replace them after their own experts advised them the hoses were dangerously unsafe without such releasing devices; HIRI had also been advised that the mooring was unsafe unless particular additional safety measures were taken. The HIRI respondents ignored all the warnings, installed none of the safety devices and took none of the other recommended safety measures. (2/9/93 RT 61-64, CR 544 at 4-5; ER 143-44; 12/8/92 RT 8, 22-23, 34-35, ER 157-58.)<sup>9</sup>

Exxon also offered to prove that Sofec had failed to order the proper chafe chain, failed to test it, and failed to provide adequate instructions regarding operating parameters. As against Bridon and Griffin, Exxon offered to prove that those respondents had either manufactured or supplied the defective chafe chain which had been poorly designed and inadequately tested. (2/9/93 RT 61-64.)

*Trial.* Adhering to its prior bifurcation order, the district court foreclosed Exxon from introducing any of its

<sup>9</sup> After the HOUSTON stranded, the Coast Guard compelled HIRI to take almost all of the safety measures they had previously ignored. (Findings 90-91, JA 160-161.)



abundant evidence of the respondents' pre-breakout breaches of warranty and torts that created the stranding hazard to which the HOUSTON ultimately succumbed. The court excluded as irrelevant the decision of the Administrative Law Judge to the Department of Transportation that had exonerated Captain Coyne from charges of negligence in the HOUSTON's stranding. (2/9/93 RT at 40-42.)<sup>10</sup>

When Phase I concluded, the court issued its Findings of Fact and Conclusions of Law holding that Captain Coyne's navigation of the stricken HOUSTON was extraordinarily negligent and that his negligence after the breakaway was the "sole" and superseding cause of the tanker's loss. (Conclusions of Law ("Conclusions") 44-45, JA 173-175.) The district court thereafter entered partial judgment for respondents based entirely upon these Findings of Fact and Conclusions. (JA 200-203, 205.) Phase II was never tried.

*Post-Trial Proceedings.* Exxon's first notice of appeal was dismissed for lack of a final appealable judgment or order. (CR 661.) Upon remand, Bridon, joined by the other respondents, moved to enter a final judgment upon all of Exxon's claims for damages caused by the grounding of the HOUSTON. (CR 662, 663-65.) Exxon then moved for entry of a final judgment limited to the claim for relief based on negligence to ripen its appeal to the Ninth Circuit. (CR 667.) In response to Bridon's motion

<sup>10</sup> The Administrative Law Judge's opinion is reproduced in full at ER 293 *et seq.* The opinion was not offered for issue preclusion because respondents were not parties to the Coast Guard proceedings. (2/19/93 RT 27.)

that judgment should be entered in favor of respondents on all of Exxon's claims for loss of the vessel (3/14/94 RT 17), Exxon objected because it had been precluded from introducing any of its evidence with respect to breaches of express and implied warranties. Exxon pointed out that respondents' defense to claims founded on tort did not apply to contractual claims. (3/14/94 RT 12-13.) The court granted Bridon's motion stating that it was thereby sending to the Ninth Circuit the question whether its judgment at the end of Phase I completely decided all of Exxon's theories for recovering for the loss of the tanker. (3/14/94 RT 19-20; CR 674.)

Judgment was entered on April 20, 1994 (CR 676), and Exxon's appeal to the Ninth Circuit was filed on April 25, 1994. (CR 677.)

## B. Summary of the Evidence

The HOUSTON was owned and operated by Exxon Shipping Company, the vessels of which carried crude oil for Exxon Company, U.S.A. All of the HIRI respondents are affiliated corporations operating the SPM and the refinery at Barbers Point, Oahu. Sofec manufactured the SPM; Griffin manufactured the chafe chain that parted; and Bridon distributed the chain. (Findings 1-5, JA 141-142.)

This maritime drama began benignly in 1988 when Exxon and HIRI entered negotiations whereby HIRI would buy crude oil from Exxon for HIRI's refinery in Oahu. The negotiations resulted in a written contract to deliver the crude to HIRI at one or more moorings to be designated by it. For the cargo to be delivered the HIRI



named its SPM as the delivery point. The SPM was one and a half miles from HIRI's refinery which is located on Oahu's coastline. (Findings 7-11, JA 143.) Title to the crude oil was to pass to HIRI when the crude flowed into HIRI's cargo hoses. (CR 624.) The contract of sale included a specifically negotiated safe berth warranty in Exxon's favor.<sup>11</sup>

The HOUSTON was a single screw, steam-propelled oil tanker, weighing 72,056 dead weight tons. She was 766.9 feet long with horsepower of 19,000 ahead and approximately 6,000 astern. (Findings 12, JA at 143.) Captain Kevin Coyne was Master of the tanker.<sup>12</sup> There were four other deck officers (Findings 18, JA 144-145); the remaining deck complement consisted of six able-bodied seamen. (Ex. 29, offered and received 2/9/93 RT 34-35; 2/9/93 RT 9; 2/10/93 RT 45; 2/17/93 RT 214; 2/18/93 RT 103.)<sup>13</sup>

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<sup>11</sup> "The terminal shall provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat. However, notwithstanding anything contained in this clause, the terminal shall not be deemed to warrant the safety of public channels, fairways, approaches thereto, anchorages, or other publicly-maintained areas either inside or outside the port area where the vessel may be directed." (Findings 8; JA 142-143.)

<sup>12</sup> At the request of his children, Captain Kevin Dick changed his surname to Coyne shortly before this action was tried. (Findings 14, JA 144; 2/9/93 RT 131.)

<sup>13</sup> The HOUSTON also had aboard a full complement of engineers and stewards; their activities are not implicated in the litigation.

Captain Steven Marvin was employed by HIRI as mooring master. He boarded the tanker on March 2, 1989 and remained aboard her at all relevant times thereafter. (Findings 21, JA 145.)<sup>14</sup> On March 2, 1989, while the tanker was discharging oil into HIRI's cargo hoses, a heavy storm arrived and with it high waves and severe ocean currents moving toward shore. (Findings 25, JA 146.) After the HOUSTON had discharged all but 90,000 barrels of crude oil, the chafe chain that had secured the tanker to SPM's buoy broke causing the tanker to be set adrift while she was still tethered to the two cargo hoses bolted to her manifold. (Findings 23-25, JA 146; 2/10/93 RT 24; 2/17/93 RT 205.) The HOUSTON's crew promptly stopped the further flow of crude oil into the cargo hoses, thereby limiting the spill to the crude in the cargo hoses themselves.

Although the cargo hoses had originally been equipped with "camlocks," quick-disconnect devices to clear the hoses from tankers when the SPM failed (Ex. 322 at ER 11628 [offered], 2/25/93 RT 170 [received], ER 285; 2/9/93 RT 29; 2/11/93 RT 66; 2/11/93 RT 176), the HIRI respondents had removed the camlocks and replaced them with 12 heavy bolts on each hose to connect the hoses to ships' manifolds. (Findings 23, JA 146.) The Captain was unable to keep the tanker close to the SPM, and the drifting tanker put tension on the cargo hoses. (Findings 25-26, JA 146-147.) At 1725, the first cargo hose parted a few feet below the water line; at 1728, the second

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<sup>14</sup> Captain Marvin had no experience aboard commercial tankers as a master or a first mate. (Findings 22, JA 145.)

cargo hose broke away from the buoy bringing with it the heavy metal spool piece that had secured the hose to the SPM (the "breakout"). (Findings 25-28, JA 146-147.) The HIRI respondents had been warned by their experts of that danger. (ER 123, 124; 12/8/92 RT 22.)

"Obviously, the breakout was a cause in fact of the stranding, *i.e.*, had the mooring chain not parted, the . . . HOUSTON would not have stranded." (Conclusions 7, JA 162.) From the time of the breakout until minutes before the tanker stranded, the vessel was crippled by 840 feet of the trailing cargo hose that, together with the spool piece, weighed 1700 pounds. (Findings 28, JA 147; 2/12/93 RT 13.) The hoses had been designed to float, but the spool piece caused a hundred feet of the hose to sink while the remainder was partially floating and partially submerged. (Findings 27-28, JA 147.) The hose repeatedly began moving under the tanker threatening to entangle her propeller or rudder; if either event had happened, the vessel would have been helpless. (2/10/93 at 87; 2/10/93 RT 33.) Because that danger would have increased if the tanker had been navigated ahead (2/10/93 RT 49, 63), Captain Coyne ordered the tanker to back; she was not designed to transit by backing and that maneuver was ponderously slow and difficult. (2/10/93 RT 89; 2/10/93 RT 38; 2/11/93 RT 114; 2/11/93 RT 165; 2/25/93 RT 117.)

The HIRI respondents knew that they had no tugs powerful enough to help tankers when the SPM failed and that it would take four to six hours to get such assistance from others. (2/12/93 RT 229; 2/9/93 RT 61-62, CR 532, ER 123-25.) HIRI had only one small tug available, the NENE, which did not have enough power to

push or pull a tanker set adrift. (2/11/93 RT 135, 226.) The NENE's crew was able to secure a line to the second cargo hose to try to keep it from drifting under the tanker. (Findings 43, JA 150.) Until that trailing hose could be successfully unbolted from the tanker and towed far enough away from the tanker to avoid restricting her navigability, it posed a continuing danger to the HOUSTON, the NENE, and the crews of both vessels. (2/10/93 RT 38, 49, 63; 2/11/93 RT 137.)

Captain Coyne tried unsuccessfully to anchor the vessel. (Findings 35, 38, JA 148-149.) He thereafter continued to back the tanker away from the shoreline and then caused her to make a lee to minimize the movements of the hose while the bolts on the cargo hose were being detached from the manifold. (2/10/93 RT 48-49, 51, 55, 58, 63-64, 67, 72-73.) Removal of the bolts consumed more than an hour. (Findings 64, JA 156.)

At 1927, while the cargo hose was suspended from the ship's starboard crane to hold it away from the ship and before the crane could lower the hose into the sea, efforts to synchronize the movements of the NENE with the tanker failed in the storm and darkness. (2/10/93 RT 111.) Captain Coyne blew the tanker's whistle to get the NENE's attention because he was unable to reach her by radio. (2/10/93 RT 112.) The HOUSTON's chief mate heard the signal and saw that the hose was dangerously close to the tanker's propeller and rudder (2/10/93 RT 202); he saw the NENE begin to pull the hose away, and he saw that the movement of the hose was putting tension on the tanker's crane. (2/18/93 RT 8-9.) The mooring master yelled at the NENE through his radio to stop before it pulled the ship's crane down. (2/17/93 RT 37.)



Efforts to reduce the strain on the crane failed. (2/12/93 RT 42, 113; ER 326-27.) The stress caused the crane's collapse and threw the crane operator to the cage railing of the operator's platform. (Findings 64-66, JA 156.) The boom of the collapsed crane began sweeping the tanker's deck, threatening the lives of the deck crew and creating the danger of its striking the ship's manifold which could cause a disastrous explosion. (2/18/93 RT 25-26.) The deck crew worked feverishly to restrain the swinging boom, but before it could be fully secured, the tanker stranded at 2009. (Findings 83, JA 159; 2/18/83 RT 99.)

When the crane collapsed, Captain Coyne ordered his second mate, the first responder for medical casualties, to leave the bridge to evaluate the crane operator's condition. (2/10/93 RT 116.) The second mate reported that the crane operator appeared to be going into deep shock from serious injuries. (Findings 72, JA 157; 2/10/93 RT 119, 122, 124.) Because the Captain had more medical training than his second mate, he decided that he should try to navigate the tanker as quickly as practicable to the safety of the deep seas where he could leave the bridge to examine the crane operator himself.<sup>15</sup> (Findings 73, JA 157.)

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<sup>15</sup> The court of appeals' opinion states that "[b]y 1803, the small assist vessel NENE was able . . . to get control of the end of the second hose so that it was no longer a threat to the larger ship." (JA 216.) As Exxon pointed out in its petition for rehearing, the statement was contradicted by the record. The opinion itself later recognized that the cargo hose had caused the port crane to collapse at approximately 1947. (JA 217.)

The opinion also stated that the crane operator "was in fact not seriously injured" (JA 233), despite the court's recognition that the crane operator was reported to be in shock (*Id.* at 217). Although it later turned out that the operator was not as

By 1956, the NENE had begun to tow the hose away from the HOUSTON, but the location of the hose could not be ascertained from the tanker either by radar or by sight. (2/10/93 RT 124; 2/11/93 RT 44; 2/25/93 RT 129.) The Captain knew that the NENE was hauling the hose from the HOUSTON's port side, and he decided to turn to port. (2/10/93 RT 124.) The Captain ordered the tanker to make a forward starboard turn at 1956 when she was one mile from the shoreline. (Findings 47, JA 153, 157; 2/11/93 RT 41.) If he had ordered her again to back, it would have taken an hour to move her another mile from the shore. (2/10/93 RT 90; 2/10/93 RT 142.) The location of the tanker at that time had been determined by parallel radar indexing, rather than by plotting fixes on the very small scale chart of the area aboard the HOUSTON. (Findings 55, JA 153.) The Captain had no reason to anticipate that the tanker would be anywhere near the stranding area until the whole chain of incidents occurred after the chain parted. While the HOUSTON was making her slow turn, she struck an undersea coral pinnacle on which she stranded at 2009, resulting in her constructive total loss. (Findings 83, JA 159.)

*The District Court's Findings, Conclusions and Judgment.* The district court resolved all the conflicts in the evidence in respondents' favor, including the sharp conflicts in the testimony of Exxon's and respondents' expert witnesses with respect to the quality of Captain Coyne's

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seriously injured as he had initially appeared to be, Captain Coyne had to make his navigation choices based on the information he then had when the operator's condition was deemed life threatening.



navigation of the stricken tanker. (Findings 61; Conclusions 36-39, JA 155, 170-171.) It adhered to its prior rulings which excluded Exxon's evidence on its case-in-chief, and it concluded that Captain Coyne was extraordinarily negligent in ordering the final turn when he had not ordered fixes to be plotted and was unaware of the undersea coral pinnacle on which the vessel stranded. In reaching those conclusions, the district court relied on two admiralty presumptions drawn respectively from *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874), and *The Louisiana*, 70 U.S. (3 Wall.) 164, 18 L.Ed. 85 (1866). (Conclusions 22-32, 44-45, JA 173-175.)<sup>16</sup>

The court denied all of Exxon's post-trial motions and entered partial final judgment against it for the loss of the tanker. (CR 667, 674; JA 200-204.)

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<sup>16</sup> *The Pennsylvania* rule is that when a master of a vessel violates a regulatory duty, he is presumptively at fault. Plotting fixes on a navigation chart is a regulatory duty (33 C.F.R. § 164.11(c)), but that navigation rule is not imposed when the master of a vessel is in perilous circumstances, as the regulations themselves recognize. Both vessels in *The Pennsylvania* were at fault, and the court divided damages equally although the fault of one was presumed and the fault of the other was proved. *The Pennsylvania*, 86 U.S. at 138.

In *The Louisiana*, the Court decided that a moving vessel is deemed to be at fault when she strikes a stationary vessel or a fixed structure.

Nothing in either case suggests that the presumed fault is more than ordinary negligence. Here defense experts opined that the Captain made navigational mistakes; apparently the court concluded that several misjudgments and presumptive fault added up to extraordinary negligence.

*Appeal.* Exxon argued that the bifurcation order, the trial orders pursuant thereto, and the ultimate judgment deprived it of procedural due process of law because admiralty law does not permit either liability for breach of warranty or for tort to be determined by confining the trial solely to the conduct of the plaintiff when the defendants' misconduct is a substantial factor in causing injury. Exxon also contended that negligence of a plaintiff is not a defense to liability for breach of express or implied admiralty warranties; it is relevant only to the assessment of damages – an issue the court refused to try. *E.g.*, *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company*, 376 U.S. 315, 321, 84 S. Ct. 748, 11 L.Ed.2d 732 (1964).

Exxon also contended that this Court has not specifically written superseding cause into general maritime law and that the doctrine, as applied below, was in conflict with the comparative fault requirement of *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.Ed.2d 251 (1975), in conflict with the Eleventh Circuit's decision in *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985) (neither common law superseding cause nor last clear chance survived comparative fault established by *Reliable Transfer*), and irreconcilable with liability based on breaches of admiralty warranties, which sound in contract, not tort.

*The Ninth Circuit's Opinion.* The lower court affirmed, rejecting all of Exxon's contentions. (JA 209-233.) The court held that the doctrine of superseding cause applies to exonerate admiralty defendants from all liability for breach of warranty, strict liability in tort and negligence even when defendants have conceded that their acts and omissions were substantial factors in causing the marine

casualties. The court held that the district court correctly concluded that the Captain's negligence was the sole legal cause of the stranding and that its interpretation of superseding cause was not in conflict with *Reliable Transfer*. The court disregarded Exxon's contention that negligence of a plaintiff in a breach of warranty case is relevant only to apportionment of damages. (JA 223.)

The opinion recognized the conflict among the circuits on the question whether the superseding cause doctrine survived *Reliable Transfer* in maritime tort actions.<sup>17</sup> (JA 219-223.) The court held that there was no need to compare fault because the doctrine, as interpreted and applied by it, is a complete defense to all of Exxon's claims for relief. It rejected Exxon's due process attack on the ground that excluding Exxon's evidence on its case-in-chief was within the district court's discretion. (JA 223-226.)

*Petition for Rehearing.* Exxon called the court's attention to factual errors and to misstatements of Exxon's arguments in the opinion.<sup>18</sup> The Petition for

<sup>17</sup> Compare *Hercules, Inc.*, 765 F.2d 1069, 1075 (intervening negligence did not survive *Reliable Transfer*) with *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992) and *Lone Star Indus. Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1459 (8th Cir. 1991) (disagreeing with the Eleventh Circuit on that point). *Hunley v. ACE Maritime Corp.*, 927 F.2d 493, 497, 498 (9th Cir. 1991) (applying superseding cause doctrine in a maritime tort case).

<sup>18</sup> E.g., the opinion states: "Because it maintains the issues of causation, from breakout to grounding, are inseverable, Exxon avers that it was unfairly prejudiced by bifurcation. We do not agree." [Emphasis added.] (JA 224.) Instead, Exxon had argued

Rehearing was denied without correcting the errors. (CP App. B.)

## SUMMARY OF THE ARGUMENT

1. The judgment which exonerated respondents from all liability in tort for their misconduct because Captain Coyne was found negligent violates *Reliable Transfer's* comparative fault rule. That rule was adopted to promote fairness and to deter wrongful behavior that is most likely to harm others. When admiralty defendants' faults are causes-in-fact of a marine casualty and a shipowner is also negligent, damages for the loss are divided among the parties on the basis of the proportionate fault of each. *City of Milwaukee v. Cement Div. Nat'l Gypsum Co.*, 515 U.S. \_\_\_, 115 S. Ct. 2091, 132 L.Ed.2d 148 (1995); *Reliable Transfer*, 421 U.S. at 410.

that legal cause of the stranding depended on the nature and extent of respondents' contractual duties and duties of care imposed upon them by admiralty law, all of which were breached before the breakout and that the hazards created by those breaches could not be severed from the events thereafter without denying Exxon the fair trial that the Due Process Clause guarantees. *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S. Ct. 513, 75 L.Ed. 1188 (1931) and its spawn.

The opinion also states: "Exxon does not dispute the district court's finding that the defendants met the duty of due diligence in all respects." JA 225, n.6. The statement is contradicted by the record and even by respondents' concession of fault. Exxon did not challenge on appeal the district court's findings on conflicting evidence that respondents were not negligent after the breakout because it would have been futile.



To encourage the district court to bifurcate liability, respondents admitted that the SPM's failure was a substantial factor in the tanker's loss, but none admitted any individual responsibility for that failure. Respondents persuaded the lower courts that liability could be determined without ever permitting Exxon to introduce its evidence of each of the respondents' serious breaches of admiralty duties before the breakout. If it had not been foreclosed, Exxon's evidence would have vividly demonstrated that loss of the tanker was one of the foreseeable hazards of respondents' wrongdoings and that Captain Coyne's fault, when compared with respondents' egregious wrongdoings, was minimal. The foreclosure orders and judgment disabled the court from apportioning fault as required by *Reliable Transfer* and violated this Court's admiralty policies by eliminating the deterrent effect of the comparative fault rule and inequitably imposing the whole loss on Exxon.

Even if this Court had explicitly incorporated common-law superseding cause into general maritime tort law (and it has not) and if the sole claim of respondents' wrongdoing had been negligence (and it was not), the respondents could not properly have been relieved from liability. Because respondents' misconduct foreseeably increased the risk of stranding and was a substantial factor in causing the loss, Captain Coyne's negligence could not have been a superseding cause of the casualty, as the Second Circuit has correctly held. *Petition of Kinsman Transit Co.*, 338 F.2d 708, 723-26 (2d Cir. 1964), cert. denied sub nom. *Continental Grain Co. v. City of Buffalo*, 380 U.S. 944 (1965). Accord, *Restatement (Second) of Torts*, § 442B (1965). Under *Reliable Transfer*, the only effect of

the Captain's negligence was to reduce proportionately the amount of damages to which Exxon was entitled. Although the Ninth Circuit has called its rationale "superseding cause", it has resuscitated contributory negligence as a complete defense to an admiralty tort. This Court abrogated that defense more than a hundred years ago. *The Max Morris*, 137 U.S. 1, 14-15, 11 S. Ct. 29, 34 L.Ed. 586 (1890).

Respondents forged the links in the liability chain before the HOUSTON left the mainland because the defects in the SPM and its allied equipment and the dangerous condition of the cargo hoses existed at that time. This case was tried and decided as if respondents' multiple breaches of admiralty duty before the breakout were irrelevant to liability. *Reliable Transfer* requires that all the faults of all the parties must be compared regardless of the particular order in which the faults occurred.

The district court's orders and ultimate judgment preventing Exxon from ever proving its liability case-in-chief not only violated this Court's admiralty policies, it also deprived Exxon of procedural due process of law.

*Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 500, 51 S. Ct. 513, 75 L.Ed. 1188 (1931) states the basic principle for deciding whether a claim or an issue can be separately tried without infringing procedural due process. The issue must be so distinct and separable that trial of it alone may be had without injustice. Captain Coyne's conduct after the breakout could not be severed from the respondents' breaches of warranty and breaches of admiralty duty before the breakout because these events were a continuum that was unbroken by any



unforeseeable force. By splitting causation in two and foreclosing Exxon from ever proving respondents' misconduct before the breakout, the district court severed the unseverable and deprived Exxon of procedural due process of law.

2. Exonerating respondents from liability for breach of express and implied warranties because Exxon's Captain was negligent violates admiralty policy established by this Court in *Italia Societa*. That policy imposes liability on the party best situated to adopt preventive measures to reduce the likelihood of injury. Respondents, not Exxon and its tanker Captain, had control over all of the equipment furnished to Exxon. Respondents were the *only* persons who were situated to take preventive measures to reduce the likelihood of grounding caused by the dangerous mooring and the ultrahazardous equipment furnished to Exxon. The decision below destroys the deterrent effect of this Court's admiralty policies.

Breach of warranty sounds in contract, not tort. Negligence of a shipowner in whose favor warranties run may reduce damages for which warrantor is liable, but it does not defeat liability. *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173-74 (2d Cir. 1962), *cert. denied sub. nom. Yacimientos Petroliferos Fiscales v. Paragon Oil Co.*, 372 U.S. 967, 83 S. Ct. 1092, 10 L.Ed.2d 130 (1963). *Cf. Restatement (Second) of Contracts* § 350 (1981).

## ARGUMENT

### I. THE APPLICATION OF COMMON-LAW SUPERSEDING CAUSE TO RELIEVE RESPONDENTS FROM ALL LIABILITY IN TORT FOR THEIR WRONGDOING IS IRRECONCILABLE WITH RELIABLE TRANSFER

This Court has applied common-law principles in admiralty cases when they are well suited to the maritime context without the "conceptual distinctions" which are "foreign to [admiralty] traditions of simplicity and practicality." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631, 79 S. Ct. 406, 3 L.Ed.2d 550 (1959). Any doubts that may have existed about the impact of a shipowner's intervening negligence on defendants' admiralty liability in tort for their breaches of duty that were substantial factors in a casualty should have been put to rest by *Reliable Transfer*.<sup>19</sup> In *Reliable Transfer* itself, the captain of the plaintiff's tanker was 75 percent at fault for the tanker's grounding, but his gross negligence did not defeat liability of the Coast Guard for negligently failing to maintain a light. Instead, the Court required the loss to be borne proportionately to the fault of each. *Reliable Transfer*, 421 U.S. at 410.

<sup>19</sup> As G. Gilmore observed before *Reliable Transfer*, "the maritime court has been less ready than the shore courts to find that a subsequent wrongful act by one party breaks the chain of causation connecting the accident with the prior negligence of the other party." G. Gilmore, C. Black, *The Law of Admiralty* § 7-5, at 494 (2d ed. 1975).

The adoption of comparative fault was based not only on the Court's concern for fairness,<sup>20</sup> but also on imposing "the strongest deterrent upon the wrongful behavior that is most likely to harm others." 421 U.S. at 405, n.11.<sup>21</sup>

The Court reaffirmed the same principle in *City of Milwaukee v. Cement Div. Nat'l Gypsum Co.*, 515 U.S. \_\_\_, 115 S. Ct. 2091, 2097, 132 L.Ed.2d 148 (1995) (*Reliable Transfer* required " 'that damages be assessed on the basis of proportionate fault when such an allocation can reasonably be made' " (quoting *McDermott, Inc. v. AmClyde*, 511 U.S. \_\_\_, \_\_\_, 114 S. Ct. 1461, 1462, 128 L.Ed.2d 148 (1994))).

<sup>20</sup> As the Court's discussion of *Reliable Transfer* was explained in *McDermott, Inc. v. AmClyde*, 511 U.S. \_\_\_, \_\_\_, 114 S. Ct. 1461 [128 L.Ed. at 156] (1994), the old damages rule was " 'inequitable.' " "Thus the interest in certainty and simplicity served by the old [divided damages] rule was outweighed by the interest in fairness promoted by the proportionate fault rule." *Ibid.*

"That a vessel is primarily negligent does not justify its shouldering all responsibility, nor excuse the slightly negligent vessel from bearing any liability at all." *Reliable Transfer*, 421 U.S. at 406.

<sup>21</sup> Respondents acknowledged the correct admiralty principle in their responding brief for the Ninth Circuit: "[H]aving established, as a matter of fact, that the injury would not have occurred but for the defendants' conduct, plaintiff must persuade the court, that, as a matter of policy, defendant should be held legally responsible for his injury." Respondents'/Appellees' Joint Brief at 29-30. Respondents failed to recognize that this Court's admiralty policy imposes responsibility for the loss of the HOUSTON squarely upon them because they, not Exxon or the tanker's captain, were best situated to take the necessary safety measures to prevent breakaways and strandings.

Thus, in *City of Milwaukee*, *supra*, 515 U.S. \_\_\_, 115 S. Ct. 2091, 2097, 132 L.Ed.2d 148 (1995) the shipowner brought its admiralty action against the City for the loss of its vessel which had broken away from the City's mooring in a storm and sank. The shipowner alleged that the City had breached its duty as a wharfinger by assigning the vessel to a berthing known to be unsafe in heavy winds and in failing adequately to warn of hidden dangers in the slip. The City contended that the shipowner was negligent because its master left the ship virtually unmanned in the winter without personnel aboard who could monitor the weather conditions or who could summon help. The district court held that the shipowner was 96 percent at fault for the loss, and it denied prejudgment interest. The appellate court modified the judgment by reducing the shipowner's fault to 75 percent, and it awarded prejudgment interest to the shipowner. This Court affirmed. After *Reliable Transfer*, marine losses are shared on the basis of proportionate fault. The shipowner's recovery had been reduced by two-thirds by reason of its own negligence, but the City was still required to pay its fair share of the loss.

The City's responsibility for the remaining one-third is no different than if it had performed the same negligent acts and the owner, instead of also being negligent, had engaged in heroic maneuvers that avoided two-thirds of the damages. The City is merely required to compensate the owner for the loss for which the City is responsible.

515 U.S. at \_\_\_, [115 S. Ct. at 2097].



In our case, Captain Coyne and the crew of the HOUSTON performed heroically in trying to rescue the vessel and her seamen from the constant perils in which respondents' misconduct placed them. In the last few minutes, they were unable to save the ship or to prevent injury to the crane operator, but the Captain's misjudgments did not relieve respondents from having to compensate Exxon for their proportionate share of the loss.

**A. The Decision Below Violated the Admiralty Policies Established by *Reliable Transfer***

Neither Exxon nor Captain Coyne had any control over the SPM and its allied equipment that threatened grounding and oil spills for every tanker moored at the facility. The HIRI respondents had actual knowledge that SPM failures were inevitable and that they had taken none of the safety precautions that their own experts had advised them to adopt. If Exxon had been permitted to try its case-in-chief, it could have presented evidence that the other respondents were chargeable with knowledge of the dangerous condition of the equipment. The respondents were unquestionably best situated to undertake safety measures to prevent breakaways and groundings. By exonerating all of the respondents from liability for the tanker's loss, the Ninth Circuit removed the deterrent effect that this Court intended to impose by adopting comparative fault.

Blaming Captain Coyne for loss of the tanker is manifestly unjust. He and the crew of the HOUSTON were valiantly dealing with a whole succession of emergencies, all of which were created by respondents' breaches of

duties, plus adverse winds, ocean currents, and darkness. The HOUSTON would have been nowhere near the stranding point but for the parting of the defective chafe chain, the lack of safety devices on the HIRI's cargo hoses, the absence of adequate tug assistance, and the inadequate training of HIRI's mooring masters. Relieving respondents from all liability for the casualty is as unfair as it would be to exonerate a defendant who had negligently set a moored tanker afire because the crew were not as adept in controlling the blaze as the defendant's expert witnesses testified they should have been.

**B. The Decision Below Violated *Reliable Transfer's* Requirement that all of Defendants' Faults Must Be Compared with the Plaintiffs' Faults in Assigning Responsibility for a Marine Casualty**

The Ninth Circuit decided this case as if the only relevant evidence of liability were the occurrences after the breakout although grounding was one of the hazards that their pre-breakout conduct created. Because the district court had foreclosed all of Exxon's evidence that would have established respondents' tortious pre-breakout acts and omissions, it could not compare degrees of fault as *Reliable Transfer* requires. All the faults of each of the respondents had to be compared with all the faults attributed to Captain Coyne irrespective of the order in which the faults occurred. That comparison would have shown that the degree of Captain Coyne's fault was slight as compared with the degrees of respondents' faults.

That defect could not be cured by respondents' admission that the SPM's failure was a cause-in-fact of



the grounding. None of the respondents admitted any individual responsibility for the failure, and the foreclosure of Exxon's evidence prevented the district court from comparing the relative degrees of faults among the respondents and likewise prevented a comparison of respondents' faults with those attributed to Captain Coyne. For example, temperatures of a group of human beings cannot be adequately compared with one another when the temperature of one party is precisely recorded on a thermometer as 102 degrees, but the temperature of all the others is recorded collectively on a device that is capable only of registering "hot" or "cold."

The Eleventh Circuit in *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), correctly applied the comparative fault rule and rejected the superseding cause doctrine in a case in which a stevedoring company tried to escape liability for negligently loading the plaintiff's barge. The barge had capsized, losing most of the cargo and damaging the barge. The stevedoring company argued that it should be relieved of liability because the barge was unseaworthy and because the barge owner and the company towing the vessel were negligent. Following *Reliable Transfer*, the court apportioned responsibility for the casualties. 765 F.2d at 1075. After pointing out that the common law doctrines of last clear chance and intervening negligence did not hold sway even under the old divided damages rule, the court held that the stevedore could not use either of those concepts to circumvent *Reliable Transfer*:

"Unless it can truly be said that one party's negligence did not in any way contribute to the

loss, complete apportionment between the negligent parties, based on their respective degrees of fault, is the proper method for calculating and awarding damages in maritime cases."

765 F.2d at 1075.

**C. Respondents could not Escape Liability even if Superseding Cause had been Incorporated into General Admiralty Law**

After respondents conceded that their collective conduct was a cause-in-fact of injury, causation was no longer in issue. The remaining liability question was whether the risk of stranding was a hazard that was or should have been foreseen by respondents. "Superseding cause" is an expression of common law policy to limit a defendant's liability when a natural or human force has intervened under circumstances that are so extraordinary and remote from the risks that the defendant's earlier negligence has created that the law deems it unjust to hold him responsible for the ensuing harm. The hazards of grounding and navigational misjudgments were foreseeable risks created by the respondents' many breaches of admiralty duties owed to Exxon, and, therefore the superseding cause doctrine was inapplicable.

*Restatement (Second) of Torts* Section 442B (1965) states the applicable blackletter principle:

Where the negligent conduct of the actor [respondents] creates or increases the risks of a particular harm [stranding] and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of

liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

*Comment b* to Section 442B explains:

[A]ny harm which is itself foreseeable [as stranding was in this case], as to which the actor has created or increased the recognizable risk, is always "proximate," no matter how it is brought about, except where there is such intentionally tortious or criminal intervention, and it is not within the scope of the risk created by the original negligent conduct.

The Second and Fifth Circuits have correctly concluded that a plaintiff's negligence does not become a superseding cause of a marine injury when the harm that occurred was within the hazards created by the defendant's breaches of duty and were or should have been foreseen by them.

In *Kinsman Transit Co.*, 338 F.2d at 711-13, a wharfinger's defective mooring device failed during a heavy storm causing a vessel to break away from the mooring. The shipowner's negligence in leaving the vessel unmanned during the storm did not relieve the wharfinger from liability for the ensuing chain of events that damaged the breakaway vessel, other vessels, and contributed to the collapse of a city bridge. *Kinsman Transit Co.*, 338 F.2d at 723-26. As Judge Friendly held in *Kinsman Transit Co.*:

It was indeed foreseeable that improper construction . . . of the "deadman" [the mooring device] might cause a ship to break loose and damage persons and property on or near the

river. . . . [A] prudent man . . . would have realized that the danger of this would be the greatest under such water conditions as developed during the night [of the casualties].

338 F.2d at 723.

The fact that the wharfinger in *Kinsman Transit Co.* did not actually foresee that the captain of the first vessel set adrift would be negligent or that the calamitous chain of events would thereafter occur did not relieve the wharfinger of liability:

[W]e would find it difficult to understand why [the wharfinger] failed to use the care required to provide for the light of expectable forces . . . when the very risks that [his] negligent conduct produced other consequences to such persons . . . were fairly foreseeable when he fell short of what the law demanded.

338 F.2d at 723-24.<sup>22</sup>

Among the risks that respondents were required to foresee was that Captain Coyne might not navigate the imperiled tanker as carefully as respondents' armchair experts testified he should when they were navigating in a quiet courtroom. The Second and Fifth Circuits have consistently recognized that when the master of a vessel is put in the center of destructive forces, as was Captain

<sup>22</sup> *Accord, Watz v. Zapata Off-Shore Co.*, 431 F.2d 100 (5th Cir. 1970) (defendant was not relieved of liability to a shipyard worker injured by a hoist failure where defendant did not actually foresee the harm nor the manner in which injury occurred because the injury was within the risks created by a defective weld in the hoist furnished by defendant).



Coyne, and he must make hard choices among competing courses of action, admiralty law requires that there must be something more than mistakes of judgment by the master to find that he was negligent, let alone extraordinarily negligent, when it turns out that his choices were wrong. *E.g.*, *Employers Ins. of Wausau v. Suwanne River Spa Lines, Inc.*, 866 F.2d 752, 772-73 (5th Cir.), *cert. denied sub nom. Employers Ins. of Wausau v. Avondale Shipyards*, 493 U.S. 820 (1989); *The Gulfstar*, 136 F.2d 461, 465 (3d Cir. 1943); *The Imoan*, 67 F.2d 603, 605 (2d Cir. 1933). Ordinary negligence does not become extraordinary, unforeseeable negligence because a plaintiff makes several mistakes instead of only one.

The Ninth Circuit's conclusion that the Captain's negligence was the "sole" cause of the stranding is inconsistent with the respondents' admission that their own conduct was a cause-in-fact of the casualty. Exoneration of all the respondents from any liability cannot be reconciled with the common-law principle upon which it purports to rely, with the comparative fault rule of *Reliable Transfer*, and with the admiralty policies that caused the court to adopt that rule.

What the Ninth Circuit has actually done is to resurrect contributory negligence as a complete defense to liability for maritime negligence and strict products liability by dubbing the defense "superseding cause." This Court buried that defense over a hundred years ago in *The Max Morris*, 137 U.S. 1. It is of great importance to domestic and international commercial shipping that this Court clearly stated that the Second and Fifth Circuits have correctly applied general admiralty law.

#### **D. The District Court's Foreclosing Exxon from Ever Proving its Case-in-Chief Deprived it of Due Process of Law**

*Gasoline Products, Inc.*, 283 U.S. at 500 stated the basic principle for deciding whether any issue can be separately tried without infringing procedural due process: the issue must be so "distinct and separable from the others that a trial of it alone may be had without injustice."<sup>23</sup> Captain Coyne's conduct *after* the breakout could not be separated from respondents' breaches of warranty and breaches of admiralty duties *before* the breakout that continued to endanger the tanker, the NENE, and the crews of both. Respondents' prior acts and omissions and the Captain's responses to the hazards thereby created formed a continuous chain of events, unbroken by any unforeseeable force. By foreclosing Exxon from proving its case-in-chief, the district court *did* sever the unseverable and, with the Ninth Circuit's approval of that surgery, Exxon was deprived of procedural due process of law guaranteed it by the Fifth Amendment.

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<sup>23</sup> Even when the issue is subject matter federal jurisdiction, that issue cannot be tried alone when it is factually interwoven with the merits of the case. *E.g.*, *Smith v. Sperling*, 354 U.S. 91, 95, 77 S. Ct. 1112, 1 L.Ed.2d 1205 (1957).



## II. THE NINTH CIRCUIT'S EXONERATION OF RESPONDENTS FROM ALL LIABILITY FOR BREACHES OF EXPRESS AND IMPLIED ADMIRALTY WARRANTIES IS CONTRARY TO ADMIRALTY POLICY ESTABLISHED BY *ITALIA SOCIETA*

### A. The Ninth Circuit Opinion is Irreconcilable with *Italia Societa*

The HIRI respondents expressly warranted the safety of the berth and impliedly warranted the safety of their allied equipment, including their cargo hoses; the remaining respondents, respectively, impliedly warranted the safety of the SPM's design and the safety of the chafe chain that failed.

Before the HOUSTON left the mainland, the HIRI respondents had breached the safe berth warranty because, as Exxon offered to prove, the HIRI respondents had actual knowledge (and Exxon did not) that their experts had warned them that SPM failures were inevitable, that their cargo hoses (without quick-release devices) were dangerous and created the hazards of grounding and oil spills for every tanker that moored at the SPM unless the recommended safety measures were undertaken. The HIRI respondents also had actual knowledge (and Exxon did not) that two tankers had earlier broken away from the SPM, that they had no tugs sufficiently powerful to aid a tanker that had broken away, that Coast Guard assistance was more than two hours away, and that their mooring masters had received no training to help a tanker that was cast adrift. By its bifurcation orders, its later exclusionary rulings and its judgment, the

district court foreclosed Exxon from ever introducing its abundant evidence on those points.

In actions for breach of maritime warranties, *Italia Societa* establishes the policy of placing the risks of loss on the persons who are best situated to prevent injuries. In that case the shipowner's negligence did not defeat liability for breach of an implied admiralty warranty when a seaman was injured by a latent defect in equipment furnished by the stevedore because the stevedore was in a better position than the shipowner to undertake safety measures to reduce the likelihood of such injuries:

[L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

376 U.S. at 324.

Neither Exxon nor Captain Coyne had any control over the respondents' dangerous equipment or the HIRI respondents' failure to take any of the recommended safety measures. To exonerate respondents from all liability for breach of warranty because the district court found that Captain Coyne was thereafter negligent is directly contrary to the policy adopted in *Italia Societa*. Negligence of a shipowner, in whose favor the warranty runs, may reduce the damages for which the warrantor is liable to the extent that such negligence constitutes a failure to mitigate damages; it does not defeat liability for breach of contract.

## B. The Ninth Circuit's Opinion is Contrary to Other Circuits

Other circuits have correctly held that warrantors of safe berth are required to anticipate all reasonably foreseeable dangers created by the combination of the force of tides, winds and seas, as well as negligent seamanship. E.g., *Eastern Massachusetts Street Ry. Co. v. Transmarine Corp.*, 42 F.2d 58, 62 (1st Cir.), cert. denied, 282 U.S. 883 (1930).

As Judge Friendly explained in *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169, 173-74 (2d Cir. 1962), cert. denied sub nom. *Yacimientos Petroliferos v. Paragon Oil Co.*, 372 U.S. 967, 83 S. Ct. 1092, 10 L.Ed.2d 130 (1963): A warrantor of safe berth may "lessen the amount of damages for which he is responsible by showing negligence, or even lack of diligence, on the part of the person wronged, in failing to take steps to lessen certain or even probable damage. . . . [T]his is an issue on which defendant has the burden." A plaintiff's contributory negligence is irrelevant to liability based on breach of an admiralty contract. *International Ore & Fertilizer Corp. v. S.G.S. Control Servs. Inc.*, 38 F.3d 1279, 1286 (2d Cir. 1994).

When a safe berth warranty has been breached, as it was here, the shipowner can recover damages for his loss, excluding only those damages that he could have avoided by taking reasonable steps to mitigate his loss. Cf. *Restatement (Second) of Contracts* § 350, pp. 126, et seq. (1981). When a plaintiff has tried to mitigate his damages and has been unsuccessful, he may nevertheless recover the full amount of his loss from the defendant. *Ibid.*

Merchant shippers and their crews must rely on wharfingers, stevedores, and others to supply them with reasonably safe moorings and facilities over which the shipowners and their captains have no control. Admiralty warranties are taken very seriously in commercial shipping because shipowners (and charterers) need the assurance of indemnification that admiralty warranties have been previously well understood to provide. If these warranties are uniformly enforced to require indemnification of shipowners and charterers when the moorings are unsafe, they provide a strong impetus to make berths safe. Those are the very concerns that were expressed by this Court in *Italia Societa* and *Reliable Transfer* which were disregarded by the Ninth Circuit.

Shipowners and seafarers must also be able to rely on uniform enforcement of warranties whether their vessels moor in Hawaii, Louisiana or New York. With the decision of the Ninth Circuit in this case, that uniformity is absent.



**CONCLUSION**

For the reasons hereinabove stated, Exxon prays that the judgment be reversed and that it be awarded its costs.

Dated: January 3, 1996.

Respectfully submitted,

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on January 8, 1962



No. 95-129

Supreme Court, U. S.  
F I L E D

JAN 3 1996

CLERK

In The  
**Supreme Court of the United States**

October Term, 1995

EXXON COMPANY, U.S.A.; EXXON  
SHIPPING COMPANY,

*Petitioners,*

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.; HAWAIIAN  
INDEPENDENT REFINERY, INC.;  
PRI MARINE, INC.; PRI INTERNATIONAL INC.,

*Respondents,*

v.

GRIFFIN WOODHOUSE, LTD., BRIDON FIBRES  
AND PLASTICS, LTD.,

*Third-Party Respondents.*

On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit

**JOINT APPENDIX**

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**Petition For Certiorari Filed July 24, 1995**  
**Certiorari Granted November 22, 1995**

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UNITED STATES DISTRICT COURT:  
DISTRICT OF HAWAII (HONOLULU) DOCKET

## PLAINTIFFS

EXXON SHIPPING  
COMPANY; EXXON  
COMPANY, U.S.A. (a  
Division of Exxon  
Corporation)

## DEFENDANTS

PACIFIC RESOURCES,  
INC.; HAWAIIAN  
INDEPENDENT  
REFINERY, INC.; PRI  
MARINE, INC.; PRI  
INTERNATIONAL, INC.;  
SOFEC, INC.

and

PACIFIC RESOURCES,  
INC.; HAWAIIAN  
INDEPENDENT  
REFINERY, INC.; PRI  
MARINE, INC.; AND PRI  
INTERNATIONAL, INC.,

Third-Party Plaintiffs,

vs.

BRIDON FIBRES AND  
PLASTICS, LTD., GRIFFIN  
WOODHOUSE, LTD.  
AND WERTH  
ENGINEERING, INC.,

Third-Party Defendants.

<u>Date</u> <u>1990</u>	<u>NR</u>	<u>Proceedings</u>
Apr 18	1	COMPLAINT; Summons Summons issued * * *
May 31	11	ANSWER to Complaint; COUNTERCLAIM; Certificate of Service - on behalf of Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.
May 31	12	Third-Party COMPLAINT; Exhibit A; Certificate of Service; Summons Summons issued
Jun 4	13	First Amended Third-Party Complaint; Exhibit A; Certificate of Service; Summons Summons issued * * *
Jun 7	16	Defendant Sofec, Inc.'s CROSSCLAIM Against Third- Party Defendants Bridon Fibres and Plastics, Ltd., Griffin Woodhouse, Ltd. and Werth Engineering, Inc.; Demand for Jury Trial
Jun 13	17	Plaintiffs' ANSWER to HIRI Defendants' Counterclaim * * *
Jul 30	29	ANSWER to Third Party Complaint - on behalf of Third Party Defendant Griffin Woodhouse, Ltd.

Aug 2	30	ANSWER of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd. to Complaint; Certificate of Service
Aug 2	31	CROSSCLAIM of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd. Against Sofec, Inc., Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc., Exxon Shipping Company, and Exxon Company, U.S.A.; Certificate of Service
Aug 2	32	ANSWER of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd. to Crossclaim of Sofec, Inc.; Certificate of Service
Aug 2	33	ANSWER of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd. to First Amended Third-Party Complaint; Certificate of Service
Aug 2	34	ANSWER of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc. to Complaint; Certificate of Service

Aug 2	35	CROSSCLAIM of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc. Against Sofec, Inc., Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc., Exxon Shipping Company, and Exxon Company, U.S.A.; Certificate of Service
Aug 2	36	ANSWER of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc. to Crossclaim of Sofec, Inc.; Certificate of Service
Aug 2	37	ANSWER of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc. to First Amended Third-Party Complaint; Certificate of Service
Aug 21	44	Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s ANSWER to CROSSCLAIM of Defendant and Third-Party Defendant Bridon Fibres and Plastic, Ltd. Against Sofec, Inc., Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc., Exxon Shipping Company, and Exxon Company, U.S.A.; Certificate of Service

Aug 21	45	Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s ANSWER to CROSSCLAIM of Defendant and Third-Party Defendant Werth Engineering and Marine, Inc. Against Sofec, Inc., Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc., Exxon Shipping Company, and Exxon Company, U.S.A.; Certificate of Service
Aug 21	46	Defendant Sofec, Inc.'s ANSWER to CROSSCLAIM of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd.
Aug 21	47	Defendant Sofec, Inc.'s ANSWER to CROSSCLAIM of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc.
Aug 22	51	Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s ANSWER to CROSSCLAIM of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd.; Certificate of Service



Aug 22	52	Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s ANSWER to CROSSCLAIM of Defendant and Third-Party Defendant Werth Engineering & Marine, Inc.; Certificate of Service * * *
<u>1991</u>		* * *
Jan 15	108	Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s CROSS-CLAIM Against Defendant Sofec, Inc.; Exhibit A; Certificate of Service * * *
<u>1992</u>		* * *
Jun 3	366	Notice of Third-Party Defendant Griffin Woodhouse, Ltd.'s Motion to Bifurcate or in the Alternative to Continue Trial; Motion to Bifurcate or in the Alternative to Continue Trial; Memorandum in Support of Motion; Exhibits "A"- "E" - 7/6/92 @ 3:00 p.m., Fong * * *

Jun 18	369	Plaintiffs Exxon Shipping Company, Inc., and Exxon Company, U.S.A.'s Memorandum in Opposition to Third Party Defendant Griffin Woodhouse Ltd.'s Motion to Bifurcate or in the Alternative, to Continue Trial; Affidavit of Judy S. Given; Exhibit "1" - "6"; Certificate of Service
Jun 18	370	Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International Inc.'s Memorandum in Response to Third Party Defendant Griffin Woodhouse, Ltd.'s Motion to Bifurcate or in the Alternative to Continue Trial; Certificate of Service * * *
Jul 27	427	EP: Defendant and Third Party Defendant Bridon Fibres & Plastics Ltd.'s Cross Motion for Partial Summary Judgment; Griffin Woodhouse's Motion to Bifurcate or in the Alternative to Continue Trial; Defendant and Third Party Defendant Bridon Fibres and Plastics, Ltd.'s Joinder in Third Party Defendant Griffin Woodhouse, Ltd.'s Joinder in Cross Motion for Partial Summary Judgment; Third Party Defendant Griffin Woodhouse, Inc.'s Joinder in Cross Motion for Partial

Summary Judgment - arguments held. Motion to Continue Trial DENIED. All remaining motions taken under advisement (TC)  
FONG  
\* \* \*

Jul 31 431 ORDER GRANTING Motion to Bifurcate, Denying Cross-Motion For Partial Summary Judgment, Denying Motion To Strike Third-Party Griffin Woodhouse, Ltd.'s Reply Memorandum And Granting Motion, In the Alternative, For Leave to File Responsive Memorandum  
cc: all parties FONG  
\* \* \*

Aug 3 433 Notice of Hearing of Plaintiffs Exxon Shipping Company and Exxon Company USA's Motion For Partial Summary Judgment Against Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc. and PRI International, Inc.; Plaintiffs' Motion; Affidavit of Judy S. Givens; Exhibits "A"-"J"; Certificate of Service - 9/21/92 @ 9:00 a.m., Fong  
\* \* \*

Aug 10 462 Notice of Plaintiffs' Motion for Clarification of Order Granting Motion of Order Granting Motion for Bifurcation, Filed July 31, 1992; Plaintiffs' Motion; Memorandum in Support of Plaintiffs' Motion; Affidavit of Judy S. Givens; Exhibits "1" and "2"; Certificate of Service - Referred to Fong  
\* \* \*

Aug 21 491 Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A.'s Reply to Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s Memorandum in Opposition To Plaintiff's Motion For Clarification Filed August 19, 1992; Certificate of Service  
\* \* \*

Aug 27 502 ORDER Denying Plaintiffs' Motion for Clarification  
cc: all parties FONG  
\* \* \*

- Sep 21 529 EP: VARIOUS MOTIONS - 1. Defendant & Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Cross - M/Partial Summary Judgment on Contract - Based Claims - GRANTED. 2. Defendant & Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Cross - M/Partial Summary Judgment on Negligence Claims - GRANTED. 3. Third-Party Defendant Griffin Woodhouse, Ltd.'s Joinder in the above two motions - GRANTED. 4. Plaintiff's M/Partial Summary Judgments Against Defendants PRI, Hawaiian Independent Refinery and PRI International, Inc. - taken under ADVISEMENT. 5. Defendant/Third Party Plaintiffs Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s M/Partial Summary Judgment - taken under ADVISEMENT. (YI) FONG  
\* \* \*
- Sep 24 531 ORDER Granting Motions By Defendant And Third-Party Defendant Bridon Fibres And Plastics, Ltd. For Partial Summary Judgment On Contract and Negligence Claims - on behalf of Defendant and Third-Party Defendant Bridon Fibres and Plastics FONG

- Sep 25 532 Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s Supplemental Memorandum In Support of Motion For Partial Summary Judgment And In Opposition To Defendants and Third Party Plaintiffs Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s Motion For Partial Summary Judgment; Declaration of Judy S. Givens; Exhibits "A" through "G"; Certificate of Service  
\* \* \*
- Oct 2 536 EP: Final Pretrial Conference - held. Parties apprised of deadlines. Parties willing to go to trial at the last minute. 24 hour notice of change of witnesses. (In chambers) YAMASHITA  
\* \* \*
- Oct 9 538 ORDER Granting In Part Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. And PRI International, Inc.'s Motion For Partial Summary Judgment And Granting In Part Plaintiff's Exxon Shipping Company, Inc. And Exxon Company, U.S.A.'s Motion For Partial Summary Judgment  
cc: all parties FONG  
\* \* \*



- Dec 2      543      Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. And PRI International, Inc.'s Position Paper Regarding The Presentation Of Evidence Concerning Gall-Thompson Breakaway Couplings During Phase I Of These Proceedings; Exhibits "A"- "C"; Certificate of Service
- Dec 2      544      Plaintiffs' Memorandum Concerning Phase of Bifurcated Trial In Which Evidence Concerning Gall Thompson Couplings Should Be Considered; Declaration of Counsel; Exhibits "A" through "H"; Certificate of Service
- Dec 8      546      EP: Rule 16 Conference - Discussion held regarding the breakaway couplings. Court ruled that the issue of breakaway couplings is excluded from evidence in Phase One of the trial, but may be addressed in Phase Two. Mr. Krek will prepare the order (TC) FONG

1993

- Feb 4      563      Notice of Motion; Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. And PRI International, Inc.'s Motion in Limine To Preclude Testimony of Thomas Cornwall, D. Stephen Kuntz, Clement Marino, Michael J. Turina And John Mascenik; Memorandum In Support of Motion; Exhibits A to C; Certificate of Service - 2/9/93 @ 9:00 a.m., Fong
- Feb 4      565      Defendant And Third-Party Defendant Bridon Fibres And Plastics, Ltd.'s Motion In Limine To Exclude The May 23, 1989 Ruling Of United States Coast Guard Administrative Law Judge Harry Gardner Re: Navigational License of Captain Kevin Coyne; Memorandum In Support of Motion; Declaration of Nenad Krek; Exhibit "A"; Certificate of Service - 2/9/93 @ 9:00 a.m., Fong

- Feb 5      567      Defendant and Third Party  
Defendant Bridon Fibres and  
Plastics, Ltd.'s Memorandum in  
Response to Defendants Pacific  
Resources, Inc., Hawaiian  
Independent Refinery, Inc., PRI  
Marine, Inc., PRI International,  
Inc.'s Motion in Limine to  
Exclude All Evidence Relating to  
Subsequent Remedial Measures;  
Certificate of Service  
•      •      •
- Feb 5      569      Defendant and Third Party  
Defendant Bridon Fibres and  
Plastics, Ltd.'s Notice of Motion  
in Limine to Exclude the May  
23, 1989 Ruling of United States  
Coast Guard Administrative  
Judge Harry Gardner  
re: Navigational License of  
Captain Kevin Coyne; Certificate  
of Service - set for 2/9/93 @  
9:00 a.m. Fong  
•      •      •

- Feb 8      574      Plaintiffs Exxon Shipping  
Company, Inc. and Exxon  
Company, U.S.A.'s Memorandum  
in Opposition to Defendant and  
Third Party Defendant Bridon  
Fibres and Plastics, Ltd.'s  
Motion in Limine to Exclude the  
May 23, 1989 Ruling of United  
States Coast Guard  
Administrative Law Judge Harry  
Gardner re: Navigational  
License of Captain Kevin Coyne;  
Certificate of Service  
•      •      •
- Feb 8      578      Plaintiffs Exxon Shipping  
Company, Inc. and Exxon  
Company, U.S.A.'s Position  
Concerning Defendants Pacific  
Defendants Pacific Resources,  
Inc., Hawaiian Independent  
Refinery, Inc., PRI Marine, Inc.,  
and PRI International, Inc.'s  
Motion in Limine to Preclude  
Testimony of Thomas Cornwall,  
D. Stephen Kuntz, Clement  
Marino, Michael J. Turina, and  
John Mascenik; Certificate of  
Service  
•      •      •

Feb 9 580 EP: Non Jury Trial - 1st day -  
 1. Pacific Resources, Inc.,  
 Hawaiian Independent Refinery,  
 Inc., PRI Marine, Inc., and PRI  
 International, Inc.'s Motion in  
 Limine to Exclude All Evidence  
 Relating to Subsequent Remedial  
 Measures DENIED. 2. Defendant  
 and Third Party Defendant  
 Bridon Fibres and Plastics, Ltd.'s  
 Motion in Limine to Exclude the  
 5/23/89 Ruling of U.S. Coast  
 Guard Administrative Judge  
 Harry Garner re: Navigational  
 License of Captain Kevin Coyne  
 GRANTED. 3. Pacific Resources,  
 Inc., Hawaiian Independent  
 Refinery, Inc., PRI Marine, Inc.,  
 and PRI International, Inc.'s  
 Motion in Limine to Preclude  
 International, Inc.'s Motion in  
 Limine to Preclude Testimony of  
 Thomas Cornwall, D. Stephen  
 Kuntz, Clement Marino, Michael  
 J. Turina and John Mascenik -  
 ruling deferred until the  
 witnesses are offered. Opening  
 statements made by each of the  
 parties. Kevin P. Coyne CST.  
 Exhibits stipulated into  
 evidence: 1 through 5, 7, 8, 9,  
 11 thru 14, 17 thru 20, 22 thru  
 31, 43, 58 thru 61, 63, 67 thru  
 73, 76, 88, 91, 92, 93, 95 thru  
 100, 109, 110, 113, 114, 115, 118,  
 120, 121, 123, 124, 131, 134, 135,  
 136, 138, 150, 151, 158, 160, 161,  
 186, 187, 231, 235, 243, 244, 245,  
 247 thru 251. Further trial  
 continued to 2/10/93 @ 9:00  
 a.m. (SP) FONG

Feb 12 584 ORDER Granting Defendant and  
 Third Party Defendant Bridon  
 Fibres and Plastics, Ltd.'s  
 Motion in Limine to Exclude the  
 Decision and Order of the  
 United States Coast Guard  
 Administrative Law Judge Harry  
 Gardner re: Navigational  
 License of Captain Kevin Coyne  
 - On Behalf of Defendant FONG

Feb 16 588 Plaintiffs Exxon Shipping  
 Company, Inc. and Exxon  
 Company, U.S.A.'s Brief  
 Concerning the Mandatory  
 Nature of Improvements to the  
 Hawaiian Independent Refinery,  
 Inc.'s Single Point Mooring;  
 Certificate of Service

Feb 16 589 Supplemental Memorandum in  
 Support of Defendants Pacific  
 Resources, Inc., Hawaiian  
 Independent Refinery, Inc., PRI  
 Marine, Inc., and PRI  
 International, Inc.'s Motion in  
 Limine to Exclude All Evidence  
 Relating to Subsequent Remedial  
 Measures Filed on February 4,  
 1993; Affidavit of Kathleen M.  
 Douglas; Exhibit J; Certificate of  
 Service - On Behalf of  
 Defendants



Feb 23 596 Plaintiffs Exxon Shipping Company, Inc. And Exxon Company, U.S.A.'s First Amended Designation of The Deposition Testimony of Michael J. Turina; Certificate of Service

Feb 25 606 EP: Further Non Jury Trial - 10th Day - Examination of James Stilwell resumed. Exhibits Admitted: 322, 324, 325, 331 & 332. Motion for Admission of the Following Depositions: John Mascenik, Thomas Cornwall and D. Stephen Kuntz - GRANTED and Subject to Motion to Strike. Received the Following depositions: Isaac Denton, David Kowalchuk, Richard Spear, James T. Lincoln, Raymond Spiller, Clement T. Marino, Michael J. Turina, Karl Bathen and Marie Helen Hunke. Plaintiff rested. Defendants' Motion For Judgment on Partial Findings Pursuant to Rule 52(c) - DENIED. Plaintiff's Motion For Judgment on Partial Findings Pursuant to Rule 52(c) - DENIED. Further Trial continued to February 26, 1993 @ 9:00 a.m. (SP) FONG

Apr 20 624 Stipulation concerning safe Berth Clause - on behalf of Plaintiffs

May 20 625 FINDINGS OF FACT AND CONCLUSIONS OF LAW - [Defendants are not legally responsible for the stranding of the Exxon Houston; Court holds Captain Coyne and his employer Exxon legally responsible]

cc: all parties FONG

Jun 16 627 NOTICE OF APPEAL by Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.; Certificate of Service (CA 90-271)

Jul 20 629 Notice of Motion; Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion for Partial Summary Judgment as to Defendants Pacific Resources, Inc.; Hawaiian Independent Refinery, Inc.; PRI Marine Inc. and PRI International, Inc.'s claims for Damage to the Single Point Mooring; Memorandum In Support of Motion for Partial Summary Judgment; Declaration of Nenad Krek; Exhibits "A"- "C"; Certificate of Service - set for 9/13/93 @ 3:00 p.m., Fong

- Aug 2 630 Notice of Hearing; Defendant Sofec, Inc.'s Motion for Pretrial Statement Judgment as to Defendants Pacific Resources, Inc. Hawaiian Independent Refinery Inc. PRI Marine, Inc., and PRI International, Inc.'s claims for damages to the single point mooring; Memorandum In Support of Motion for Summary Judgment; Affidavit of Randall K. schmitt; Exhibits "A"- "E"; Certificate of Service set for 10/12/93 @ 10:30 a.m., Fong
- Aug 2 631 Amended Notice of Motion of Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion for Partial Summary Judgment as to Defendants Pacific Resources, Inc.; Hawaiian Independent Refinery, Inc.; PRI Marine Inc. and PRI International Inc.'s claims for Damage to the Single Point Mooring; Certificate of Service - set for 10/12/93 @ 10:30 a.m., Fong
- \* \* \*

- Aug 17 634 Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A.'s Opposition to Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion for Partial Summary Judgment as to Defendants Pacific Resources, Inc.; Hawaiian Independent Refinery, Inc.; PRI Marine Inc. and PRI International, Inc.'s Claims for Damage to the Single Point Mooring; Exhibit "A"; Certificate of Service
- Aug 17 635 Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A.'s Opposition to Defendant Sofec, Inc.'s Motion for Partial Summary Judgment as to Defendants and Third-Party Plaintiffs Pacific Resources, Inc., PRI Marine Inc. and PRI International, Inc.'s Claims for Damage to the Single Point Mooring; Exhibit "A"; Certificate of Service

Aug 17 636 Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A.'s Opposition to Third-Party Defendant Griffin Woodhouse, Ltd.'s Motion for Partial Summary Judgment as to Defendants and Third-Party Plaintiffs Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine Inc. and PRI International, INC.'s Claims for Damage to the Single Point Mooring; Exhibit "A"; Certificate of Service  
\* \* \*

Oct 22 659 ORDER Granting Sofec's, Bridon Fibres and Plastics', and Griffin Woodhouse's motions for Partial Summary Judgment - HIRI is precluded from recovering in tort for damage to the SPM  
cc: All parties

Nov 5 660 ORDER GRANTING Bridon Fibres and Plastics' motion to Dismiss Allegations of Diversity and to Strike Demand for a Jury Trial and Granting Sofec's motion for Leave to Amend Pleadings to Proceed in Admiralty  
cc: All counsel FONG

Nov 29 661 Order - 9th CCA - That the appeal in this case is hereby DISMISSED. (CA 93-16236) (Filed and entered 11/4/94)  
**SCHROEDER, D.W. NELSON & THOMPSON**

1994

Jan 12 662 Notice of Motion; Motion of Defendant/Third-Party Defendant Bridon Fibres and Plastics, Ltd. to Direct Entry of a Final Judgment Upon Plaintiffs' claims for Damages caused by the Grounding of the Exxon Houston; Memorandum In Support of Motion; Certificate of Service - set for 3/14/94 @ 10:30 a.m., Fong

Jan 19 663 Defendant Sofec, Inc.'s Joinder in Defendant/Third Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion to Direct Entry of Final Judgment Upon Plaintiffs' Claims for Damages Caused by the Grounding of the Exxon Houston Filed on January 12, 1994; Certificate of Service - set for 3/14/94 @ 10:30 a.m., Fong

Jan 25 664 Defendant/Third-Party Plaintiffs Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s Joinder in Defendant/Third-Party Defendant Bridon Fibres and Plastics, Ltd.'s Motion to Direct Entry of a Final Judgment Upon Plaintiffs' Claims for Damages Caused by the Grounding of the Exxon Houston Filed on 1/12/94; Certificate of Service  
\* \* \*



- Feb 22 666 Plaintiffs' Memorandum in Opposition to Motion of Defendant/Third Party Defendant Bridon Fibres and Plastics, Ltd. to Direct Entry of a Final Judgment Upon Plaintiffs' Claims for Damages Caused by the Grounding of the Exxon Houston Filed January 12, 1994; Certificate of Service
- Feb 22 667 Notice of Motion; Motion of Plaintiffs to Direct Entry of a Final Judgment Upon the Findings of Fact and Conclusions of Law Entered on May 201, 1993, and for a Stay; Memorandum in Support of Motion; Certificate of Service set for 3/14/94 @ 10:30 a.m., Fong Defendants/Third-Party Plaintiffs Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc.'s Joinder in Motion of Defendant/Third-Party Defendant Bridon Fibres and Plastics, Ltd. to Direct Entry of a Final Judgment Upon Plaintiff's claim for Damages caused by the Grounding on the Exxon Houston; Certificate of Service
- \* \* \*

- Mar 31 674 ORDER Directing Entry of A Final Judgment Pursuant to Fed. R. Civ. P. 54(b) Upon Less Than All Claims And As To Less Than All Parties FONG
- \* \* \*
- Apr 20 676 JUDGMENT - that pursuant to Fed. R. Civ. P. 54(b), final judgment is hereby entered against plaintiffs on all causes of action stated in their complaint as follows:
- A. In favor of all Defendants on Plaintiffs' claim for damages to and loss of the Exxon Houston; and
- B. In favor of Defendants Sofec, Inc., Bridon Fibres and Plastics, Ltd., and Griffin Woodhouse, Ltd., on Plaintiffs' claim for recovery of costs of clean-up of the bunker oil spill. (cc: all parties) CHINN
- Apr 25 677 NOTICE OF APPEAL by Plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.; Certificate of Service
-

Plaintiff	Defendant
Exxon Shipping Company, et al.	Pacific Resources, Inc., et al.

GENERAL DOCKET FOR NINTH CIRCUIT  
COURT OF APPEALS

Court of Appeals Docket #: 94-15806  
Nsuit: 4120 Contract - Marine (Div) Filed: 5/10/94  
Exxon Shipping, et al. v. Pacific Resources, et al.  
Appeal from: District of Hawaii (Honolulu)

<u>Date</u>	<u>Proceedings</u>
5/11/94	Docketed Cause and Entered Appearances of Counsel * * *
8/1/94	Filed certificate of record on appeal RT filed in DC 7/22/94 (em) * * *
10/19/94	Filed original and 15 copies Appellants Exxon Shipping, and Exxon Company opening brief (Informal: no) 46 pages and five excerpts of record in 02 volumes; served on 10/17/94 (ot)
12/21/94	Filed original and 15 copies Appellees Pacific Resources Inc, et al. 49 pages, 05 Suppl Exc. 01 vols: served on 12/19/94 minor defcy: no Statement of Related Cases, Notified counsel, appellants' reply brief due 1/9/95 for Exxon Company, for Exxon Shipping; minor brief deficiency response due 1/4/95; records on appeal due 1/9/95; (ot)

12/27/94 Filed original and 15 copies Appellee Pacific Resources, Appellee Hawaiian Independent, Appellee PRI Marine, Inc., Appellee PRI International supplemental brief of 15 pages, served on 12/19/94 (rei)

12/28/94 Received Appellee Bridon Fibres satisfaction of (minor) brief deficiency. (stmnt of related cases, table of contents, table of authorities & no proof of service) RECORDS\*\* (vt)  
\* \* \*

1/20/95 Filed original and 15 copies Exxon Shipping, Exxon Company reply brief, (Informal: no) 25 pages; served on 1/18/95 [PANEL] (ot)  
\* \* \*

2/13/95 FILED CERTIFIED RECORD ON APPEAL IN 19 VOLS. (total): 0 CLERKS REC; 19 RTs (ORIG) (ot)  
\* \* \*

3/14/95 ARGUED AND SUBMITTED TO William C. CANBY, Charles E. WIGGINS & Thomas G. NELSON; CJJ. (jr)

4/26/95 FILED OPINION: AFFIRMED (Terminated on the Merits after Submission Without Oral Hearing; Affirmed; Written, Signed, Published. William C. CANBY; Charles E. WIGGINS; Thomas G. NELSON, author.) FILED AND ENTERED JUDGMENT. (dl)  
\* \* \*

5/10/95 Filed original and 03 copies Appellant Exxon Shipping, Appellant Exxon Company petition for rehearing, (PANEL) 14 p. pages, served on 5/9/95 (ot)  
\* \* \*

5/24/95 Filed order (William C. CANBY; Charles E. WIGGINS; Thomas G. NELSON, ): Apls' petition for rehearing is denied. (em)  
 6/1/95 MANDATED ISSUED. Costs taxed against plaintiffs (Exxon) in the amount of \$545.50 in favor of Bridon Fibres. (jr)  
 8/3/95 Rec'd notice from Supreme Court; petition for certiorari filed on 7/24/95, Supreme Court No. 95-129. (jr)

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY )	CIVIL NO.
and EXXON COMPANY, U.S.A. )	90-00271HMF
(A Division of Exxon )	COMPLAINT;
Corporation), )	SUMMONS
Plaintiffs, )	(Filed
vs. )	Apr. 18, 1990)
PACIFIC RESOURCES, INC., )	
HAWAIIAN INDEPENDENT )	
REFINERY, INC., PRI MARINE, )	
INC., PRI INTERNATIONAL, )	
INC., and SOFEC, INC. )	
Defendants. )	

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COMPLAINT

Plaintiffs EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A Division of Exxon Corporation) (hereinafter "EXXON COMPANY, U.S.A."), as a



Complaint against Defendants PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC. (hereinafter collectively "HIRI"), and SOFEC, INC. allege as follows:

1. This is a case of admiralty and maritime jurisdiction, as hereinafter more fully appears, and is an admiralty and maritime claim within the meaning of Rule 9(h) of the Federal Rules of Civil Procedure and 28 U.S.C. 1333.

#### PARTIES

2. EXXON SHIPPING COMPANY at all material times herein, was the owner and operator of EXXON HOUSTON, Official No. D297151, an oil tanker of U.S. registry.

3. EXXON COMPANY, U.S.A. and PRI INTERNATIONAL, INC. at all material times herein were parties to a "sales contract". By this contract, PRI INTERNATIONAL, INC. extended to EXXON COMPANY, U.S.A., and to all vessels mooring at HIRI's Single Point Mooring (hereinafter "SPM") buoy within the terms of the contract, a warranty of safe berth.

4. EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. at all material times herein were parties to a "Contract of Affreightment" pertinent parts of which concerned the mooring of EXXON HOUSTON to HIRI's SPM buoy. By this contract, EXXON COMPANY, U.S.A. extended a warranty of safe berth to EXXON HOUSTON.

5. HIRI Defendants PRI INTERNATIONAL, INC., PRI MARINE, INC., and HAWAIIAN INDEPENDENT

REFINERY, INC., are wholly owned subsidiaries of HIRI Defendant PACIFIC RESOURCES, INC.

6. SOFEC, INC. at all material times herein was the manufacturer and/or distributor of a CALM-type single point mooring buoy, its appurtenances, gear and equipment (hereinafter "SPM" or "SPM buoy") located at Barber's Point, Oahu, Hawaii.

7. HIRI, at all materials times herein, was the owner and/or operator of the said SPM buoy.

#### FACTS

8. On or about March 2, 1989, EXXON HOUSTON was moored at HIRI's SPM buoy and was operated under the terms and conditions of the aforesaid "sales contract" and "Contract of Affreightment".

9. EXXON SHIPPING COMPANY duly performed all terms and conditions of the Contract of Affreightment to be performed.

10. EXXON COMPANY, U.S.A. duly performed all terms and conditions of the sales contract to be performed.

11. EXXON HOUSTON, previous to the events described in this Complaint, was in all material respects tight, strong, staunch, seaworthy and fit for the subject voyage.

12. The sales contract provided that ownership of the cargo oil shifted to HIRI once the oil passed the last flange on the vessel into HIRI's cargo hoses.

13. At approximately 1715 on March 2, 1989, the chafing chain, which was part of HIRI's mooring equipment on its SPM buoy, parted, causing EXXON HOUSTON to breakaway from its berth. EXXON HOUSTON immediately closed its cargo valves, which prevented any further discharge of crude oil from EXXON HOUSTON. HIRI's floating cargo hoses subsequently parted, spilling HIRI's oil from the cargo hoses into the sea. EXXON HOUSTON subsequently went aground due to the breakaway and suffered severe hull damage.

14. At all material times herein, EXXON HOUSTON was commanded by Captain Kevin P. Dick, Coast Guard Master's License No. 010448.

15. At all material times herein, a compulsory mooring master/pilot employed and designated by HIRI was aboard EXXON HOUSTON for the purpose, among other things, of advising EXXON HOUSTON's master concerning; navigation in the vicinity of HIRI's berth, local weather and sea conditions and local navigational hazards, mooring and unmooring at HIRI's berth, connecting and disconnecting HIRI's cargo hoses, and loading and discharging cargo through HIRI's cargo hoses. Mooring Master Steve Marvin was aboard EXXON HOUSTON at or about the time of the said breakaway.

16. At all material times herein, HIRI required EXXON SHIPPING COMPANY, EXXON COMPANY, U.S.A., and EXXON HOUSTON to use the services of a mooring master and pilot appointed by HIRI.

17. On or about March 1, 1989, HIRI, through its mooring master, directed and supervised the mooring of

EXXON HOUSTON to HIRI's SPM buoy. HIRI, through its mooring master, subsequently supervised and directed the hook up of HIRI's cargo hoses and discharge of its cargo.

#### FIRST CAUSE OF ACTION - BREACH OF CONTRACT AND WARRANTIES

18. Plaintiffs reallege Paragraphs 1 through 17 of this Complaint as if set forth at length hereinafter.

##### A. BREACH OF WARRANTY OF SAFE BERTH.

19. The sales contract between EXXON COMPANY, U.S.A. and PRI INTERNATIONAL, INC. provides in part as follows:

"The terminal shall provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat."

20. EXXON SHIPPING COMPANY and EXXON HOUSTON are third-party beneficiaries to the sales contract.

21. The Contract of Affreightment between EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. provides in part as follows:

"The loading or discharge berth shall be . . . designated by EUSA. . . . The berth shall be safe so that vessels can always lie safely afloat while proceeding to, remaining at, or departing from it."



22. HIRI expressly and impliedly warranted to EXXON COMPANY, U.S.A., to EXXON SHIPPING COMPANY and to EXXON HOUSTON to provide a safe berth to EXXON HOUSTON.

23. HIRI breached its contractual and implied warranties to provide a safe berth to EXXON HOUSTON.

24. EXXON COMPANY, U.S.A. is obligated to pay the damages suffered by EXXON SHIPPING COMPANY and EXXON HOUSTON as a result of HIRI's breaches of contractual and implied warranties.

25. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's violation of its contractual and implied warranties to provide a safe berth.

26. By reason of its violation of its contractual and implied warranties to provide a safe berth, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY, and EXXON COMPANY, U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any and all damages, costs, fees and fines that may be imposed upon it by reason of the events described in the Complaint.

#### B. BREACH OF DUTY TO CLEAN UP OIL.

27. The sales contract further provides in part as follows:

"In the event a cargo is spilled or escapes during the loading or discharging of a vessel or when vessel is in close proximity to the terminal, whether such spill is caused by the terminal, vessel, third parties, or otherwise, the terminal shall undertake such measures as reasonably necessary to prevent or mitigate resulting pollution damage."

28. HIRI breached its duty to undertake such measures as reasonably necessary to prevent or mitigate resulting pollution damage.

29. As a legal result of such aforesaid breach, EXXON HOUSTON, EXXON SHIPPING COMPANY, and EXXON COMPANY, U.S.A. suffered damages and expenses to clean up the oil spill for which HIRI is liable.

#### C. BREACH OF DUTY TO PAY FOR CARGO.

30. The said sales contract further provides in part as follows:

"Title to, risk of loss, and liabilities for all cargo delivered hereunder shall be deemed to occur when it passes the flange connection between the vessel's manifold and the hose connection at the port of load or discharge . . ."

31. HIRI breached the said sales contract with EXXON COMPANY, U.S.A. by its failure to pay for cargo delivered under the terms of the contract.

32. As a result of said breach by non-payment, EXXON COMPANY, U.S.A. suffered damages for which HIRI is liable.



SECOND CAUSE OF ACTION -  
BREACH OF WARRANTY

33. Plaintiffs reallege Paragraphs 1 through 32 of this Complaint as if set forth at length hereinafter.

A. BREACH OF WARRANTY OF WORKMANLIKE PERFORMANCES.

34. The sales contract further provides in part as follows:

"Hoses for loading or discharging, as the case may be, shall be furnished by the terminal and shall be connected and disconnected by the terminal. . . ."

35. At all material times herein, HIRI agreed to furnish stevedoring and terminal services to EXXON HOUSTON, EXXON SHIPPING COMPANY, and EXXON COMPANY, U.S.A.

36. HIRI warranted, expressly and impliedly, to EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. to perform the stevedoring and terminal services in a workmanlike manner.

37. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by violation of HIRI's warranty of workmanlike performance.

38. By reason of its violation of its warranty of workmanlike performance, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON

SHIPPING COMPANY and EXXON COMPANY U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any and all damages, costs, fees and fines that may be imposed upon them by reason of the events subscribed in the Complaint.

B. BREACH OF EXPRESS WARRANTY

39. HIRI, through its employee, Mooring Master Marvin, expressly warranted to the Master of EXXON HOUSTON, that HIRI's berth was safe in the weather and sea conditions prevailing just prior to the breakaway on March 2, 1989.

40. HIRI breached its express warranty that its berth was safe in the weather and sea conditions prevailing on March 2, 1989.

41. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's violation of its express warranty that HIRI's berth was safe in the weather and sea conditions prevailing prior to the breakaway on March 2, 1989.

42. By reason of its violation of its express warranty regarding conditions prevailing just prior to the breakaway, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A., and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any and all damages, costs, fees

and fines, that may be imposed upon them by reason of the events described in the Complaint.

### THIRD CAUSE OF ACTION - NEGLIGENCE

43. Plaintiffs reallege Paragraphs 1 through 42 of this Complaint as if set forth at length hereinafter.

44. HIRI negligently failed to provide a safe berth and adequate mooring for EXXON HOUSTON.

45. HIRI negligently furnished a mooring master and pilot to EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A.

46. HIRI negligently failed to provide information to assist the Master of EXXON HOUSTON in local navigation after the parting of HIRI's SPM buoy chafing chain.

47. HIRI negligently failed to maintain, inspect and repair its SPM buoy.

48. HIRI negligently failed to establish and maintain safe operating weather and sea parameters for its SPM buoy.

49. HIRI negligently failed to provide adequate equipment to safely conduct cargo operations on EXXON HOUSTON and perform oil spill cleanup.

50. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of the EXXON HOUSTON, and the damages suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's negligent failure to provide a safe berth and adequate mooring.

51. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damages suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's negligent furnishing of a mooring master and pilot.

52. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damages suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's negligent failure to maintain, inspect, and repair its SPM buoy.

53. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damages suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's negligent failure to establish and maintain safe operating weather and sea parameters for its SPM buoy.

54. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damages suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by HIRI's negligent failure to provide adequate equipment to properly discharge the cargo and perform oil spill cleanup.

55. By reason of its negligent failure to provide a safe berth and adequate mooring, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY,



U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any and all damages, costs, fees and fines that may be imposed upon them by reason of the events described in the Complaint.

56. By reason of its negligent furnishing of a mooring master and pilot, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A., and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any all damages, costs, fees and fines that may be imposed upon them by reason of the events described in the Complaint.

57. By reason of its negligent failure to maintain, inspect and repair its SPM buoy, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any all damages, costs, fees and fines that may be imposed upon them by reason of the events described in the Complaint.

58. By reason of its negligent failure to establish and maintain safe operating weather and sea parameters for its SPM buoy, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any all damages, costs, fees and fines that may be imposed upon them by reason of the events described in the Complaint.

59. By reason of its negligent failure to provide adequate equipment to properly discharge cargo and perform oil spill cleanup, HIRI is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. and HIRI is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any all damages, costs, fees and fines that may be imposed upon them by reason of the events described in the Complaint.

#### FOURTH CAUSE OF ACTION – PRODUCTS LIABILITY

60. Plaintiffs reallege Paragraphs 1 through 59 of this Complaint as if set forth at length hereinafter.

61. At all material times herein, Defendant SOFEC, INC. negligently designed, manufactured, selected materials, assembled, inspected, tested, maintained for sale, marketed, distributed, leased, sold, recommended and delivered the aforesaid SPM buoy in such a manner so as to cause said SPM buoy to be in a defective and unsafe condition, and unfit for use in the way and manner such products are customarily treated, used and employed; and, that Defendant SOFEC, INC. negligently failed to discover said defects and/or failed to warn and/or adequately test and give adequate warning or instructions of known or knowable hazards, dangers, and risks to users of said SPM buoy of said defects and dangers.

62. At all material times herein, said SPM buoy was in substantially the same condition as at the time of design, manufacture, assembly, testing, inspection, marketing, distribution and sale.



63. At all material times herein, said SPM buoy failed to meet consumer expectations of safety, and was unreasonably dangerous and in a defective condition as to design and marketing, and Defendant SOFEC, INC. failed to warn or give adequate warning calculated to reach the ultimate users or consumers of the dangers of said SPM buoy.

64. At all material times herein, Defendant SOFEC, INC. at the time of design, manufacture and sale of said SPM buoy, expressly and impliedly warranted that said SPM buoy was of merchantable quality, properly designed, manufactured and reasonably fit and suitable for ordinary use as a mooring facility for oil tankers.

65. At all material times herein, Defendant SOFEC, INC. breached said warranty, in that, among other things, said SPM buoy was not of merchantable quality nor properly designed nor manufactured nor fit for ordinary use as a mooring facility for oil tankers; that said SPM buoy was designed, manufactured, fabricated, assembled, supplied, marketed, sold and distributed in such a dangerous and defective condition that said SPM buoy was reasonably likely to, and did, cause legal injury by reason of Defendant SOFEC, INC.'s design and manufacture and failure to warn; and further said SPM buoy could not safely be used by persons exercising ordinary and reasonable care.

66. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were

legally caused by SOFEC, INC.'s negligent design, manufacture, selection of materials, assembly, inspection, testing, maintenance for sale, marketing, distribution, lease, sale, recommendations, and delivery of the aforesaid SPM buoy; and legally caused by SOFEC, INC.'s negligent failure to discover said defects and/or failure to warn and/or failure to adequately test and give adequate warning or instructions of known or knowable hazards, dangers, and risks to users of said SPM buoy of said defects and dangers.

67. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by the failure of SOFEC, INC.'s SPM buoy to meet consumer expectations of safety and by the unreasonably dangerous and defective condition as to design and marketing of the SPM buoy, and by SOFEC, INC.'s failure to warn or give adequate warning, calculated to reach the ultimate users or consumers of the dangers of said SPM buoy.

68. The breakaway from the SPM buoy, the oil spill, the subsequent grounding of EXXON HOUSTON, and the damage suffered by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. were legally caused by SOFEC, INC.'s breach of expressed and implied warranties that said SPM buoy at the time of design, manufacture and sale was of merchantable quality, properly designed, manufactured and reasonably fit and suitable for ordinary use as a mooring facility of oil tankers.

69. By reason of SOFEC, INC.'s negligent design, manufacture, selection of materials, assembly, inspection, testing, maintenance for sale, marketing, distribution, lease, sale, recommendations, and delivery of the aforesaid SPM buoy; and by reason of SOFEC, INC.'s negligent failure to discover said defects and/or failure to warn and/or adequately test and give adequate warning or instruction of known or knowable hazards, dangers, and risks to users of said SPM buoy of said defects and dangers; and by reason of the failure of SOFEC, INC.'s SPM buoy to meet consumer expectations of safety and the SPM buoy's unreasonably dangerous and defective condition as to design and marketing, and SOFEC, INC.'s failure to warn or give adequate warning calculated to reach the ultimate users or consumers of the dangers of said SPM buoy; and by reason of SOFEC, INC.'s violation of its expressed and implied warranties that said SPM buoy at the time of design, manufacture and sale, was of merchantable quality, properly designed, manufactured and reasonably fit and suitable for ordinary use as a mooring facility for oil tankers; SOFEC, INC. is liable for any and all damages sustained by EXXON HOUSTON, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. and SOFEC, INC. is obliged to indemnify EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. for any and all damages, costs, fines and fees that may be imposed upon them by reason of the events described in the Complaint.

#### DAMAGES

70. As a result of the aforesaid breaches of contract, breaches of warranties, product defects, and negligence,

EXXON SHIPPING COMPANY has suffered the following damages: property damage to EXXON HOUSTON; incidental damages, including but not limited to, salvage, refloating, towage, surveying, port charges, additional personnel and repairs; loss of charter hire; loss of use of the vessel; loss of profits; loss of business opportunities; loss of good will; costs assessed and incurred for oil cleanup and environmental restoration; attorneys' fees and litigation costs; and additional expenses and related damages in the approximate amount of SIXTEEN MILLION DOLLARS (\$16,000,000.00), as near as can now be calculated, none of which has been paid although duly demanded.

71. As a result of the aforesaid breaches of contract, breaches of warranty, product defects, and negligence, EXXON COMPANY, U.S.A. has suffered the following damages: non-payment for its cargo, loss of profit, the obligation to reimburse EXXON SHIPPING COMPANY and EXXON HOUSTON for their damages as a result of the subject incident; attorneys' fees and litigation costs in an amount to be proven at trial.

WHEREFORE, EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. demand judgment against HIRI and SOFEC, INC. jointly and/or severally in an amount to be proven at trial, estimated to be approximately SIXTEEN MILLION DOLLARS (\$16,000,000.00) plus non-payment for cargo, in addition to interest, costs, reasonable attorneys' fees, and such other and further relief as this Court deems proper.



DATED this 18th day of April, 1990 at Honolulu,  
Hawaii.

ALCANTARA & FRAME

/s/ Joy Lee Cauble  
LEONARD F. ALCANTARA  
JOY LEE CAUBLE  
Of Attorneys for Plaintiffs

\_\_\_\_\_  
IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and )	CIVIL NO.
EXXON COMPANY, U.S.A. (A )	_____
Division of Exxon Corporation, )	SUMMONS
Plaintiffs, )	
vs. )	
PACIFIC RESOURCES, INC., )	
HAWAIIAN INDEPENDENT )	
REFINERY, INC., PRI MARINE, INC., )	
PRI INTERNATIONAL, INC., and )	
SOFEC, INC. )	
Defendants. )	

\_\_\_\_\_

SUMMONS

TO: PACIFIC RESOURCES, INC.  
733 Bishop Street  
Honolulu, Hawaii 96813  
HAWAIIAN INDEPENDENT REFINERY, INC.  
733 Bishop Street  
Honolulu, Hawaii 96813  
PRI MARINE, INC.  
733 Bishop Street  
Honolulu, Hawaii 96813  
PRI INTERNATIONAL, INC.  
733 Bishop Street  
Honolulu, Hawaii 96813  
SOFEC, INC.  
6300 Rothway, Suite 100  
Houston, Texas 77040

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon Plaintiffs' attorneys ALCANTARA & FRAME, 900 Fort Street, Suite 1100, Honolulu, Hawaii 96813 an answer to the Complaint which is herewith served upon you within twenty (20) days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

DATED: Honolulu, Hawaii, APR 18 1990.

Walter A.Y.H. Chinn  
CLERK

[Seal]

(s) Marcia Mullins  
BY DEPUTY CLERK

\_\_\_\_\_



GOODSILL ANDERSON QUINN & STIFEL

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Attorney for Third-Party  
Defendant, GRIFFIN WOODHOUSE, LTD.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING	)	CIVIL NO.
COMPANY and EXXON	)	90-00271 HMF
COMPANY, U.S.A. (A	)	NOTICE OF THIRD-
Division of Exxon	)	PARTY DEFENDANT
Corporation),	)	GRIFFIN
Plaintiffs,	)	WOODHOUSE, LTD.'S
vs.	)	MOTION TO
PACIFIC RESOURCES, INC.,	)	BIFURCATE OR IN
HAWAIIAN INDEPENDENT	)	THE ALTERNATIVE TO
REFINERY, INC., PRI	)	CONTINUE TRIAL;
MARINE, INC., PRI	)	MOTION TO
INTERNATIONAL, INC.,	)	BIFURCATE OR IN
and SOFEC, INC.,	)	THE ALTERNATIVE TO
Defendants,	)	CONTINUE TRIAL;
	)	MEMORANDUM IN
	)	SUPPORT OF MOTION;
	)	EXHIBITS "A"-"E"

and	)	(Filed
PACIFIC RESOURCES, INC.,	)	June 3, 1992)
HAWAIIAN INDEPENDENT	)	TRIAL DATE:
REFINERY, INC., PRI	)	October 13, 1992
MARINE, INC., and PRI	)	DATE : July 6, 1992
INTERNATIONAL, INC.,	)	TIME : 3:00 pm
Third-Party	)	JUDGE: Harold M.
Plaintiffs,	)	Fong
vs.	)	

\* \* \*

economy is evident because trial time would be reduced from 8 weeks to 2 weeks at the most. Furthermore, there will be no entitlement to a jury trial as demanded by Sofec since the sole issue before the Court is solely within the admiralty jurisdiction of the Court. A jury trial of this case could easily exceed 10 weeks.

The savings of time and cost to the parties cannot be overstated. Deposition time can be reduced by at least 50 days, though several of the depositions involving technical matters concerning metallurgy in particular may take several days each. Furthermore, expert fees and attorneys' costs and expenses collectively will probably exceed \$750,000 for this discovery. These are funds which could be available for settling the remaining minor damage disputes amongst the parties once the navigation issue is resolved.

Griffin Woodhouse submits that the Court's bifurcation of the issue of whether Captain Dick's navigation of the Exxon Houston for approximately 3 hours was the proximate cause of the grounding is warranted by the

time and cost savings to both the Court and the parties. Griffin Woodhouse respectfully requests that to further assure cost effectiveness in time and expenses for all concerned that the

\* \* \*

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Leonard F. Alcantara - #1521

Robert G. Frame - #1449

Judy S. Givens - #4435

Joy Lee Cauble - #4216

ALCANTARA & FRAME

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Attorneys for Plaintiffs

EXXON SHIPPING COMPANY, INC. and

EXXON COMPANY, U.S.A.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING	)	CIVIL NO.:
COMPANY and EXXON	)	90-00271 HMF
COMPANY, U.S.A. (A	)	IN ADMIRALTY
Division of Exxon	)	PLAINTIFFS EXXON
Corporation),	)	SHIPPING COMPANY, INC.
Plaintiffs,	)	and EXXON COMPANY,
vs.	)	U.S.A.'S MEMORANDUM
	)	IN OPPOSITION TO
PACIFIC RESOURCES,	)	THIRD-PARTY
INC., HAWAIIAN	)	DEFENDANT GRIFFIN
INDEPENDENT	)	WOODHOUSE LTD.'S
REFINERY, INC., PRI	)	MOTION TO BIFURCATE
MARINE, INC., PRI	)	OR IN THE ALTERNATIVE,
INTERNATIONAL,	)	TO CONTINUE TRIAL;
INC., and SOFEC, INC.,	)	AFFIDAVIT OF JUDY S.
Defendants,	)	GIVENS; EXHIBITS "1" -
	)	"6";
	)	CERTIFICATE OF SERVICE

PACIFIC RESOURCES, INC.;	)	(Filed
HAWAIIAN INDEPENDENT REFINERY, INC.;	)	June 18, 1992)
PRI MARINE, INC.; and	)	Trial Date:
PRI INTERNATIONAL, INC.,	)	October 13, 1992
	)	Hearing date:
	)	July 6, 1992
	)	Time: 3:00 p.m.
Third-Party Plaintiffs,	)	Judge Harold M. Fong
vs.	)	
BRIDON FIBRES AND PLASTICS, LTD.,	)	
GRIFFIN WOODHOUSE, LTD.,	)	
and WERTH ENGINEERING, INC.,	)	
Third-Party Defendants.	)	

Thus, contrary to Griffin's assertions, the cause or causes of the HOUSTON's grounding are neither simple nor undisputed. Only after the Court has heard and considered all of the evidence will it be in a position to determine the causes of the grounding and the fault of the parties.

### III. ARGUMENT

While Exxon suspects that Griffin's motion to bifurcate was brought only to cast its alternate motion to continue in a more favorable light, and with no sincere belief that the bifurcation would be granted, Exxon will address matters in the order set forth by Griffin.

#### 1. BIFURCATION ALONG THE LINES SOUGHT BY GRIFFIN SHOULD NOT BE PERMITTED.

Griffin has not cited a single case in which bifurcation has been permitted when comparative fault might apply. There are no such cases.

It is true the trial court has discretion to sever claims or issues for separate trial under FRCP 42, when a separate trial will further "*convenience*", "*avoid prejudice*", or "*be conducive to expedition and economy*". In doing this, the court must of course preserve the right to jury trial claimed by any of the parties.

Bifurcation in this case would convenience only the defendants, could actually increase costs and litigation time, and would be severely prejudicial to plaintiffs. The prejudice would result from the exclusion of all evidence supporting a finding of fault by the defendants.

Griffin argues that if the Court will only focus on whether Captain Dick's navigation caused the HOUSTON to ground, and disregard all the evidence plaintiffs wish to present concerning such matters as the cause of the chafe chain's failure, Sofec's design of the Single Point Mooring, the operation and maintenance of the Single Point Mooring by Hawaiian Independent



Refinery, and the fact that the HOUSTON had an 840 foot hose attached to its side, capable of wrapping itself around the ship's propeller and completely disabling the vessel, it will be quite clear that Captain Dick's navigation was the exclusive cause of the grounding.

How the Court could make a determination as to cause without considering all the factors at play the night of the grounding is a matter of some perplexity. In any event, Griffin's proposal begs the question. Comparative fault applies in cases of this sort, except when the trier of fact finds that losses can be attributed to separate causes. *Newby v. Kristen Gail*, 937 F.2d 1439, 1992 A.M.C. 149 (9th Cir. 1991).

*United States v. Reliable Transfer Co. Inc.*, 421 U.S. 397, 1975 A.M.C. 541 (1975), abandoned the rule of divided damages in admiralty, and replaced it with comparative fault:

We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. . . .

421 U.S. at 411.

Before the Court can determine whether comparative fault applies, it must hear the evidence concerning whether two or more parties contributed by their fault to cause damage.

Comparative fault principles also apply in strict products liability suits. *Pan-Alaska Etc. v. Marine Constr. & Design Co.*, 565 F.2d 1129 (9th Cir. 1977).

*Protectus Alpha v. North Pacific*, 767 F.2d 1379 (9th Cir. 1986), relied upon by Griffin, merely holds that *when damages can be attributed to separate causes*, then comparative fault principles do not apply. First, however, there must be a factual determination that there are separate causes, as there was in the District Court in *Protectus*. To find the facts, the Court must conduct an evidentiary hearing on the relevant causation factors as discussed below, and would have to impanel a jury. Given those requirements, there certainly would be no expedition of the litigation from the bifurcation sought by Griffin.

In order to bifurcate on Griffin's terms, the Court would have to find as fact either (1) that Exxon's damages can be attributed to separate causes, or (2) that the master's alleged negligence was an intervening superseding cause.

In this case, in order to determine whether damages may be attributed to separate causes, the Court must first determine that the initial tortfeasors' various negligent acts and omissions had ceased to be an operating force at the time Exxon's master's alleged negligence came into play. See e.g. *Protectus Alpha v. North Pacific*, 767 F.2d 1379, 1986 A.M.C. 56 (9th Cir. 1985); *Kalland v. North American Van Lines*, 716 F.2d 570 (9th Cir. 1983); *Restatement (Second) of Torts* sec. 433A. The Court must therefore look at all the defendants' negligent acts and omissions, essentially all the evidence except as to damages. If the Court determines their negligence was not an operating force, and therefore the grounding was caused separately from the breakaway, there is no point in determining whether Exxon's master was negligent, because none of the Defendants will be liable.

Similarly, whether the master's alleged negligence is an intervening superseding cause, which would cut off Defendants' liability at the point of the intervening event, requires examination of all the claimed causes of the casualty. See e.g. *Hunley v. Ace Maritime Corp.*, \_\_\_ F.2d \_\_\_, 1991 A.M.C. 1217 (9th Cir. 1991); *White v. Roper*, 901 F.2d 501 (9th Cir. 1990); *Miss Janel Inc. and U.S. Fire Insurance Co. v. Elevating Boats, Inc. et al.*, 1989 A.M.C. 1870 (S.D. Ala. 1989); *Nat G. Harrison Overseas Corp. v. American Tug Titan*, 1975 A.M.C. 2257, 516 F.2d 89 (5th Cir. 1985); *Fosbre v. State of Washington*, 1967 A.M.C. 1170, 424 P.2d 901 (Wash. 1967).

The Ninth Circuit follows the principles of the Restatement (Second) of Torts in determining whether an intervening act is a superseding cause which terminates the earlier tortfeasors' liability. *Hunley v. Ace Maritime Corp.*, *supra*. Some factors to be considered are whether the intervening force in hindsight appears to be extraordinary rather than normal in view of the circumstances existing at the time of its operation, whether the intervening force brings about harm different in kind from that which would otherwise have resulted from the earlier tortfeasors' negligence, and the degree of culpability of the earlier tortfeasors who set the stage for the intervening force.

"An intervening negligent act will not supersede an actor's initial negligent conduct if the intervening act is a normal consequence of a situation created by the actor's conduct and the manner in which it is done is not extraordinarily negligent." *Hunley v. Ace Maritime Corp.*, *supra*. Again, the Court would be required to look at all the evidence of negligence and other fault.

Bifurcation as requested by Griffin would not save time or expense, but would result in extreme prejudice to Exxon by eliminating consideration of evidence establishing the fault of the defendants. For all these reasons, Griffin's motion for bifurcation should be denied.

## 2. GOOD CAUSE HAS NOT BEEN SHOWN TO CONTINUE THIS TRIAL.

FRCP 16 provides that a scheduling conference order, once entered, may not be altered except upon a showing of good cause. Inability to complete discovery within the time limits set by the scheduling conference order does not constitute good cause unless the party requesting continuance has exercised good faith and due diligence to meet the deadline. See Advisory Committee Note to the 1983 Amendment to Rule 16. When a party allows several months to pass without taking any significant action to move discovery along, a request for continuance is not grounded on good cause. See e.g.

\* \* \*



IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY	)	Civil No.
and EXXON COMPANY, U.S.A.	)	91-00271 HMF
(A Division of	)	(Filed Jul 31, 1992)
Exxon Corporation),	)	
Plaintiffs,	)	
vs.	)	
PACIFIC RESOURCES, INC.,	)	
HAWAIIAN INDEPENDENT	)	
REFINERY, INC., PRI MARINE,	)	
INC., PRI INTERNATIONAL,	)	
INC., and SOFEC, INC.,	)	
Defendants.	)	
and	)	
PACIFIC RESOURCES, INC.,	)	
HAWAIIAN INDEPENDENT	)	
REFINERY, INC., PRI	)	
MARINE, INC., and	)	
PRI INTERNATIONAL, INC.,	)	
Third-Party	)	
Plaintiffs,	)	
vs.	)	
BRIDON FIBRES AND PLASTICS,	)	
LTD., GRIFFIN WOODHOUSE,	)	
LTD., and WERTH	)	
-ENGINEERING, INC.,	)	
Third-Party	)	
Defendants.	)	

ORDER GRANTING MOTION TO BIFURCATE, DENY-  
ING CROSS-MOTION FOR PARTIAL SUMMARY JUDG-  
MENT, DENYING MOTION TO STRIKE THIRD-PARTY  
GRIFFIN WOODHOUSE, LTD.'S REPLY MEMORAN-  
DUM AND GRANTING MOTION, IN THE ALTERNA-  
TIVE, FOR LEAVE TO FILE RESPONSIVE  
MEMORANDUM

INTRODUCTION

On July 27, 1992, the court heard third-party defendant Griffin Woodhouse, Ltd.'s ("Griffin") motion to bifurcate or, in the alternative, to continue trial filed on June 3, 1992. Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc. (collectively "HIRI") filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 18, 1992. Defendant and third-party defendant Bridon Fibres and Plastics, Inc. ("Bridon") also filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 19, 1992. Defendant Sofec, Inc. ("Sofec") also filed a joinder in the motion to bifurcate and an opposition to the alternative motion to continue on June 22, 1992. Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A. (collectively "Exxon") filed a memorandum in opposition on June 18, 1992. Griffin, in turn, filed a memorandum in reply on July 16, 1992. On July 24, 1992, Exxon filed a motion to strike Griffin's reply memorandum or, in the alternative, for leave to file responsive memorandum.

Bridon filed a cross-motion for partial summary judgment on June 18, 1992, which was joined by Sofec and Griffin on June 22, 1992, and by HIRI on June 23,



1992. Exxon filed a memorandum in opposition on July 7, 1992. Bridon, in turn, filed a memorandum in reply on July 16, 1992.

### BACKGROUND

This case arises out of the March 2, 1989 breakaway of the EXXON HOUSTON, which was owned and operated by Exxon, from HIRI's single point mooring (SPM) at Barber's Point and subsequent grounding approximately three hours later. The breakaway occurred when a Type "C" chafe chain, which was used to connect the SPM to the EXXON HOUSTON, parted. Post-accident, destructive testing of the chain has indicated that the welds of the chain links *may* have been defective.

### DISCUSSION

#### I. CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT

##### A. Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it believes demonstrate the absence of any genuine

issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986). The movant must be able to show "the absence of a material and triable issue of fact," *Richards v. Neilsen Freight Lines*, 810 F.2d 898, 902 (9th Cir. 1987), although it need not necessarily advance affidavits or similar materials to negate the existence of an issue on which the non-moving party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323, 106 S. Ct. at 2553. *But cf., id.*, 477 U.S. at 328, 106 S.Ct. at 2555-56 White, J., concurring).

If the moving party meets its burden, then the opposing party may not defeat a motion for summary judgment in the absence of any significant probative evidence tending to support his legal theory. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). The opposing party cannot stand on his pleadings, nor can he simply assert that he will be able to discredit the movant's evidence at trial. *See T.W. Elec.*, 809 F.2d at 630. Similarly, legal memoranda and oral argument are not evidence and do not create issues of fact capable of defeating an otherwise valid motion for summary judgment. *British Airways Bd. v. Boeing Co.*, 585 F.2d 946, 952 (9th Cir. 1978), *cert. denied*, 440 U.S. 981 (1979). Moreover, "if the factual context makes the nonmoving party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Franciscan Ceramics*, 818 F.2d at 1468, citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986).

The standard for a grant of summary judgment reflects the standard governing the grant of a directed verdict. See *Eisenberg v. Insurance Co. of North America*, 815 F.2d 1285, 1289 (9th Cir. 1987), citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2512 (1986). Thus, the question is whether "reasonable minds could differ as to the import of the evidence." *Id.*

However, when "direct evidence" produced by the moving party conflicts with "direct evidence" produced by the party opposing summary judgment, "the judge must assume the truth of the evidence set forth by the nonmoving party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Also, inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.* Inferences may be drawn both from underlying facts that are not in dispute, as well as from disputed facts which the judge is required to resolve in favor of the non-moving party. *Id.*<sup>1</sup>

#### B. Analysis

With its cross-motion, Bridon seeks a judgment on the pleadings that the parting of the Type "C" chafe chain, which connected the EXXON HOUSTON to the

---

<sup>1</sup> For the purposes of deciding this motion, the court applies substantive admiralty law. With respect to the adoption and application of products liability law in admiralty cases, the Supreme Court and the Ninth Circuit have borrowed substantially from principals developed in "land-based" jurisprudence. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-75 (1986); *Pan-Alaska Fisheries, Inc. v. Marine Construction & Design Co.*, 565 F.2d 1129, 1133 (9th Cir. 1977).

SPM, was not the proximate cause of the grounding of the EXXON HOUSTON. According to Bridon, the testimony of the vessel's officers shows that, after the EXXON HOUSTON broke out from the SPM, the vessel had reached and remained at a point of safety for one hour and fifteen minutes before she left the safe area and drifted towards the shore, eventually grounding two hours and fifty minutes after the breakout. Bridon further contends that the "undisputed evidence on the record shows that the decision of the vessel's Master to stop the progress of the vessel along her course away from the shore was a voluntary decision made when the vessel was in no imminent danger and when he had ample time to reflect on possible courses of action." As such, Bridon argues that Exxon cannot establish a causal nexus or connection between the parting of the chafe chain and the subsequent grounding nearly three hours later.

At the time of the breakout, the EXXON HOUSTON was connected to the SPM by a mooring assembly, which included a Type "C" chafe chain, manufactured by Griffin and sold by Bridon, and by two oil hoses, eighteen inches (18") in diameter and eight hundred feet (800') long, which were mounted on the ship's manifold. The cause of the failure of the chafe chain and the resulting breakout is disputed.

Once the chafe chain parted, the master of the EXXON HOUSTON, Captain Dick, attempted to prevent the oil hoses from breaking by bringing the vessel's head to the SPM buoy. In spite of his efforts, one hose broke close to the ship, dangling harmlessly from the manifold, whereas the second hose tore at the buoy, with its entire



length remaining connected to the manifold. For the purpose of the motion, Bridon does not contest Exxon's claim that the second hose obstructed the navigation of the EXXON HOUSTON by preventing the vessel from proceeding ahead out of concern that the hose would become entangled in the propeller. Assuming this obstruction, the navigation of the EXXON HOUSTON was restricted to backward movement using astern propulsion.

Furthermore, Bridon assumes, for the purpose of the motion, that from the time of the breakout at approximately 1715 hours until 1803 hours, Captain Dick was attempting to gain control of the vessel. At 1803, Captain Dick set the vessel, moving astern, on a westerly course, roughly parallel to the coastline between Pearl Harbor and Barbers Point. Bridon's Memorandum in Support of Cross-Motion for Partial Summary Judgment, Exhibit B at 212-13, 233 (Deposition of Second Officer Hallock G. Davis, III) ("Davis Deposition"). At 1830 hours, it appears that the EXXON HOUSTON had cleared Barbers Point and was in some 100 feet of water.

The parties dispute, however, whether the EXXON HOUSTON could have continued on the same course until it was positioned far from the shoreline.<sup>2</sup> Although Exxon has admitted that there was no mechanical limitation on the capabilities of the vessel's engines which would have precluded her from continuing on her

<sup>2</sup> Furthermore, the parties dispute whether the navigation or maneuvering of the EXXON HOUSTON that led to her grounding, *after* the hose had been disconnected, was negligent.

1803-1830 course, Captain Dick has testified that circumstances precluded him from continuing to navigate the EXXON HOUSTON offshore.

Q. You said that it would be prudent to get further offshore, but the circumstances made it difficult to do so?

A. That's true. . . .

Q. Now, what circumstances are we talking about?

A. The position of the hose, the wind, sea and swell conditions, the ship being able to only use astern propulsion because of the position of the hose.

Q. Did these circumstances remain constant throughout the entire period from the breakaway up and to the grounding?

A. No, they were ever changing, but always present.

Exxon's Memorandum in Opposition, Exhibit 1 at 374-75 (Deposition of Kevin P. Coyne, f.k.a. Kevin Dick) ("Dick Deposition").

On the other hand, Second Officer Davis, who was responsible in part for the navigation of the vessel, testified that there was nothing to prevent Captain Dick from continuing on his westerly course - away from shore - proceeding astern.

Q. Was the ship proceeding generally in a westerly direction from 1803 until 1830?

A. That's correct.



Q. Do you know of any reason why the vessel, after 1830, could not have proceeded in the same direction?

A. No, I don't.

Q. Was – are you aware of any necessity for change of direction of the vessel at – after 1830?

A. Not that I can recall.

Davis Deposition at 233-35; *see also* Exxon's Memorandum in Opposition, Exhibit 2 at 318 (Deposition of Steve Marvin, HIRI's mooring master) (describing "beautiful" ease with which the EXXON HOUSTON was able to proceed astern). The vessel allegedly remained in the general vicinity of its 1830 position, southwest of Barbers Point, for one hour and fifteen minutes, until 1948 hours, during which time the crew was disconnecting the oil hose. In the process, the hose damaged the vessel's crane and put its operator into danger, requiring the assistance of other crew members. At 2006 hours, the vessel grounded.

It is elementary that Exxon has the burden of proving that the breakout of the vessel from her mooring was the proximate cause of the grounding. 1 Am. Law Prod. Liab.2d *Proximate Causation* § 4:3 (1987); 63 Am. Jur.2d *Products Liability* §§ 261, 264 (1984). Proximate causation is defined as "that cause which, in a natural and continuous sequence, unbroken by any efficient, intervening cause, produces the injury, and without which the result would not have occurred." 1 Am. Law Prod. Liab.3d *Products Liability* § 4:1 (1987); *see generally* *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 n.1, 1991 A.M.C. 1217

(9th Cir. 1991) (citing Restatement (Second) of Torts on relevant factors used to determine whether intervening force is superseding cause). To prove that the failure of the Type "C" chafe chain proximately caused the grounding, Exxon would have to show that the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of the grounding. *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982).<sup>3</sup>

The Court of Appeals for the Ninth Circuit has adopted the Restatement (Second) of Torts for the elements of a defense of superseding cause. *Hunley v. Ace Maritime Corp.*, *supra*.

The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the operation;

<sup>3</sup> Where the relevant facts show that the causal connection between the defendant's negligence and the plaintiff's injury is remote, the question of causation is decided by the court as a matter of law. *Robertson v. Allied Signal, Inc.*, 914 F.2d 360 (3d Cir. 1990); *see also* *Rexall Drug Co. v. Nihili*, 276 F.2d 637, 645 (9th Cir. 1960) (proximate cause becomes a question of law if evidence is insufficient to raise reasonable inference that act complained of was proximate cause of injury).

- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or was not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
- (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;
- (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Restatement (Second) of Torts § 442. In support of its motion, Bridon writes that the court need not determine whether any negligence on the part of Captain Dick created such an intervening force; instead, Bridon relies on the (disputed) fact that the EXXON HOUSTON reached a "point of safety" to establish a superseding cause of the grounding. Bridon refers the court to *V/O Exportkhleb and Insurance Co. of U.S.S.R. (Ingosstrakh) Ltd. v. S.S. William A. Reiss*, 1983 A.M.C. 782 (1982) (E.D. Ohio 1982) for the proposition that "when a vessel which successfully avoids a collision or other emergency, and after having reached a point of safety, goes aground, the initial negligence of the other vessel which had placed the grounded vessel in danger is extinguished as a proximate cause of the grounding." Bridon's Memorandum in Support of Motion for Partial Summary Judgment at 13.

Even though Bridon has pled its case persuasively, the motion must be denied. First, there is a material issue

of disputed fact as to whether Captain Dick was responding to or struggling with the consequences of the breakout, and the attendant, changing circumstances of the rough seas, from the time of the breakout up until the time of the grounding. See Restatement (Second) of Torts §§ 443 and 445 (explaining that actions taken in consequence to situation created by negligent conduct are not superseding cause of harm). Because of the conflicting testimony on the capacity of the EXXON HOUSTON to proceed astern, and farther off shore, the issue of causation is not appropriate for summary adjudication at this stage.

Second, Bridon's characterization of the law in this area is only partially accurate. In *V/O Exportkhleb*, the plaintiff's ship went aground five to six minutes after it had narrowly avoided colliding with the defendant's vessel. The district court held that, because the shallow waters were not thrust upon the plaintiff's ship suddenly and the plaintiff had ample opportunity to avoid the danger, the plaintiff's negligence after the passing was the proximate cause of the grounding. As such, in order to find that the navigation of the EXXON HOUSTON was a superseding cause of the grounding, this court would be required to find that Captain Dick's actions, in arresting the movement of the vessel at 1830 and, subsequently, in maneuvering the vessel, were, in fact, negligent.<sup>4</sup> See

<sup>4</sup> According to Bridon, once the EXXON HOUSTON was in a safe position in deep water for over one hour, any forces that may have initially been set in motion by the parting of the chafe chain had long since been extinguished. In this regard, Bridon appears to rely on the doctrine of *res ipsa loquitur* - the grounding must have resulted from the (negligent) navigation of the



*Dougherty v. United States*, 207 F.2d 626, 630, 1953 A.M.C. 1541, 1547 (3d Cir. 1953), *quoted in V/O Exportkhleb*, 1983 A.M.C. at 739. It is not enough, for the purpose of breaking the chain of events set in motion by the breakout, for the court to find that the EXXON HOUSTON had reached a point of safety.

The court would also note that the negligence standard required to establish a superseding cause is higher than in ordinary circumstances. As the Restatement (Second) of Torts instructs:

The fact that an intervening act of a third person is negligent in itself or is done in a negligent manner does not make it a superseding cause of harm to another which the actor's negligent conduct is a substantial factor in bringing about, if

- (a) the actor at the time of his negligent conduct should have realized that a third person might so act, *or*
- (b) a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted, *or*
- (c) the intervening act is a normal consequence of a situation created by the actor's conduct and *the manner in which it is done is not extraordinarily negligent.*

---

vessel. As discussed above, a finding that the navigation of the vessel was the superseding cause of the grounding must be predicated on a finding of negligence.

Restatement (Second) of Torts § 447 (emphasis altered). The evidence presented in the record is clearly insufficient to support a finding by this court, on summary judgment, that the navigation of the EXXON HOUSTON by its master was negligent, least not extraordinarily so.

Accordingly, the motion for partial summary judgment is DENIED.

## II. MOTION TO BIFURCATE OR IN THE ALTERNATIVE, TO CONTINUE TRIAL

Griffin seeks to bifurcate the issue of causation, as between the breakout and the post-breakout navigation of the EXXON HOUSTON, from the other liability issues in the case – that is, the extent to which the master's navigation of the EXXON HOUSTON caused its grounding on March 2, 1989. Griffin asserts that bifurcation could obviate the need for extensive discovery, trial preparation, and weeks of trial if the court first determines the cause or comparative causes of the grounding, excluding the cause of the breakout. In this regard, Griffin suggests that such an inquiry is discrete and much simpler for adjudication than the cause of the breakout itself.

According to the Marine Casualty Report submitted by Exxon following the accident, the damages alleged by Exxon for the loss of the EXXON HOUSTON amounts to approximately eighty percent (80%) of the total damages claim. Assuming that these damages are resolved or allocated in the first phase of a bifurcated trial, Griffin and the other defendants assert that the parties will likely settle the remaining twenty percent (20%) of claimed damages. Exxon disputes these estimates. The court need



not, however, resolve this dispute as a predicate to deciding the motion to bifurcate.

The court has broad discretion to order separate trials pursuant to Rule 42(b) of the Federal Rules of Civil Procedure when a separate trial will further convenience, avoid prejudice or "be conducive to expedition and economy." See *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1517 (9th Cir. 1985); *Airlift International v. McDonnell Douglas Corp.*, 685 F.2d 267, 269 (9th Cir. 1982). Here, a separate trial offers the probability of settlement after the conclusion of the first phase in the opinion of every defendant. Only Exxon holds to the contrary. Additionally, if the court determines that the navigation of the EXXON HOUSTON was the proximate cause of its grounding, then it would be unnecessary for the court to resolve the issue of "comparative fault." See *Protectus Alpha Navigation v. North Pacific Grain Growers Ass'n*, 767 F.2d 1379 (9th Cir. 1986). In *Protectus*, the plaintiff's ship caught fire while moored at the dock. The defendants employees apparently panicked and negligently cast the ship adrift whereafter the ship was destroyed by fire because the fire fighters could not reach her. In affirming the trial court's disposition, the Court of Appeals for the Ninth Circuit explained why a determination of comparative fault was unnecessary.

The [district] court found that 92.5% of the loss was sustained after the ship was set adrift, and therefore attributed that percentage of liability to [defendant] North Pacific.

Appellant [North Pacific] contends that the district court erred in ignoring principles of

comparative negligence and apportioning damages based upon its view of causation, rather than culpability. . . .

However, as [plaintiff] Protectus points out, there is no shipowner negligence to "compare." Even if Protectus were negligent in causing the fire, such negligence had ceased to be an operating force when the vessel was cast off by North Pacific's employees. The testimony of each expert and fireman who viewed the fire that night was that the fire would have been put out in fifteen to twenty minutes had the vessel not been cast off. . . .

Where injuries can properly be apportioned to separate causes based on evidence in the record, there is no occasion to invoke the doctrine of comparative negligence . . . The whole point of comparative negligence is that the relation between injury and cause cannot be accurately determined, and an allocation based on the degree of negligence of each party becomes the measure of liability.

767 F.2d 1383-84; see also *Newby v. F/V Kristen Gail*, 937 F.2d 1439, 1992 A.M.C. 149 (9th Cir. 1991) (comparative fault inapplicable where trier of fact concludes that losses can be attributed to separate causes).

On the other hand, if the court does not find that the navigation of the vessel was the superseding cause of the grounding, the court can still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 95 S. Ct. 1708, 44 L.E.2d 251 (1975). As

discussed earlier, a determination of whether the master's alleged negligence is an intervening, superseding cause, which would cut off defendants' liability at the point of the intervening event, requires an examination of all the claimed causes of the casualty. *See Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 1991 A.M.C. 1217 (9th Cir. 1991); *White v. Roper*, 901 F.2d 501 (9th Cir. 1990).

The court is well aware of the possibility that the issue of causation with respect to the breakout may still require a second phase of trial, perhaps before a jury. The court, however, is in the best position to determine whether bifurcation *in this case* promotes judicial economy. The court finds that it does.

Accordingly, the motion to bifurcate is GRANTED so that the first phase of the trial will be limited to the issue of causation with respect to the EXXON HOUSTON's grounding, but not including the issue of causation with respect to the breakout itself.<sup>5</sup>

Finally, the court must address Exxon's motion to strike Griffin's reply memorandum or, in the alternative, for leave to file responsive memorandum. After reviewing Griffin's moving papers, the court does not find that Griffin changed its position vis-a-vis the scope of the first phase of the bifurcated trial in a manner that would violate Local 220-4. Nevertheless, the court, in its discretion, will permit Exxon to file the responsive memorandum attached as an exhibit to its motion. Exxon should be

<sup>5</sup> Having granted the motion to bifurcate, the court does not address the motion, in the alternative, to continue trial.

advised that the court has carefully reviewed and considered the proposed filing in connection with its ruling on the motion to bifurcate.

Accordingly, the motion to strike is DENIED and the motion, in the alternative, for leave to file responsive memorandum is GRANTED.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, July 31, 1992

/s/ Harold M. Fong  
UNITED STATES  
DISTRICT JUDGE

EXXON SHIPPING COMPANY and EXXON COMPANY, U.S.A. (A division of Exxon corporation) vs. PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., PRI INTERNATIONAL, INC., and SOFEC, INC.; PACIFIC RESOURCES, INC., HAWAIIAN INDEPENDENT REFINERY, INC., PRI MARINE, INC., and PRI INTERNATIONAL, INC. vs. BRIDON FIBRES AND PLASTICS, LTD., GRIFFIN WOODHOUSE, LTD., and WERTH ENGINEERING, INC.

Civil No. 91-00271 HMF

ORDER GRANTING MOTION TO BIFURCATE, DENYING CROSS-MOTION FOR PARTIAL SUMMARY JUDGMENT, DENYING MOTION TO STRIKE THIRD-PARTY GRIFFIN WOODHOUSE, LTD.'S REPLY MEMORANDUM AND GRANTING MOTION, IN THE ALTERNATIVE, FOR LEAVE TO FILE RESPONSIVE MEMORANDUM



Leonard F. Alcantara - #1521  
 Robert G. Frame - #1449  
 Judy S. Givens - #4435  
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Attorneys for Plaintiffs  
 EXXON SHIPPING COMPANY, INC. and  
 EXXON COMPANY, U.S.A.

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII  
 (Filed Aug. 10, 1992)

EXXON SHIPPING COMPANY )	CIVIL NO.:
and EXXON COMPANY, U.S.A. )	90-00271 HMF
(A Division of Exxon )	IN ADMIRALTY
Corporation), )	NOTICE OF
Plaintiffs, )	PLAINTIFFS'
vs. )	MOTION FOR
)	CLARIFICATION OF
PACIFIC RESOURCES, INC., )	ORDER GRANTING
HAWAIIAN INDEPENDENT )	MOTION FOR
REFINERY, INC., PRI MARINE, )	BIFURCATION,
INC., PRI INTERNATIONAL, )	FILED JULY 31,
INC., and SOFEC, INC., )	1992; PLAINTIFFS'
Defendants, )	MOTION;
)	MEMORANDUM IN
PACIFIC RESOURCES, INC.; )	SUPPORT OF
HAWAIIAN INDEPENDENT )	PLAINTIFFS'
REFINERY, INC.; PRI MARINE, )	MOTION;
INC.; and PRI )	AFFIDAVIT OF
INTERNATIONAL, INC., )	JUDY S. GIVENS;
Third-Party )	EXHIBITS "1" and
Plaintiffs, )	"2"; CERTIFICATE
)	OF SERVICE

vs.	) Date: July 27, 1992
BRIDON FIBRES AND	) Time: 3:45 p.m.
PLASTICS, LTD., GRIFFIN	) Judge
WOODHOUSE, LTD., and	) Harold M. Fong
WERTH ENGINEERING, INC.,	)
Third-Party	)
Defendants.	)

NOTICE OF PLAINTIFFS' MOTION FOR  
CLARIFICATION OF ORDER GRANTING MOTION  
FOR BIFURCATION, FILED JULY 31, 1992

TO: Randall K. Schmitt, Esq.  
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 Attorneys for Defendants  
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 HAWAIIAN INDEPENDENT REFINERY,  
 INC., PRI MARINE, INC., and  
 PRI INTERNATIONAL, INC.

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 BRIDON FIBRES AND PLASTICS, LTD.



John R. Lacy, Esq.  
 GOODSILL ANDERSON QUINN & STIFEL  
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 Honolulu, Hawaii 96813  
 Attorney for Third-Party Defendant  
 GRIFFIN WOODHOUSE, LTD.

NOTICE IS HEREBY GIVEN that on August 10, 1992, the undersigned filed with the above-entitled Court a Motion for Clarification of Order Granting Motion for Bifurcation. Any response to said Motion must be filed with the Court no later than eleven (11) days after having been served with a copy thereof.

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII

EXXON SHIPPING	)	CIVIL NO.:
COMPANY and EXXON	)	90-00271 HMF
COMPANY, U.S.A. (A	)	IN ADMIRALTY
Division of Exxon	)	MEMORANDUM
Corporation),	)	IN SUPPORT OF
	)	PLAINTIFFS'
Plaintiffs,	)	MOTION FOR
	)	CLARIFICATION
vs.	)	OF ORDER
PACIFIC RESOURCES, INC.,	)	GRANTING
HAWAIIAN INDEPENDENT	)	MOTION FOR
REFINERY, INC., PRI	)	BIFURCATION,
MARINE, INC., PRI	)	FILED JULY 31,
INTERNATIONAL, INC.,	)	1992
and SOFEC, INC.,	)	
	)	
Defendants,	)	

PACIFIC RESOURCES, INC.;	)
HAWAIIAN INDEPENDENT	)
REFINERY, INC.; PRI	)
MARINE, INC.; and PRI	)
INTERNATIONAL, INC.,	)
	)
Third-Party	)
Plaintiffs,	)
	)
vs.	)
	)
BRIDON FIBRES AND	)
PLASTICS, LTD., GRIFFIN	)
WOODHOUSE, LTD., and	)
WERTH ENGINEERING,	)
INC.,	)
	)
Third-Party	)
Defendants.	)

MEMORANDUM IN SUPPORT OF MOTION FOR  
CLARIFICATION OF ORDER GRANTING MOTION FOR  
BIFURCATION. FILED JULY 31, 1992

I. INTRODUCTION

The Court's Order for separate trial of part of the causation issues has been interpreted differently by the parties. There are substantial disputes as to what evidence will be admissible and which issues will be tried in the bifurcated phase. Plaintiffs move therefore for clarification, seeking to avoid further discovery disputes.

As plaintiffs understand the Order, they will be able to introduce all evidence pertaining to the cause of the grounding. The chafe chain failure would be considered as a cause of the grounding, but no evidence concerning the cause of the chain's failure would be admissible at the

first trial, and no determination as to the cause of the chain's failure would be made at the conclusion of the first trial. If the failure of the chain is found to have been a cause of the grounding, the cause of the failure would be tried later.

Conversely, plaintiffs have gained the impression that the defendants are of the opinion that only navigation issues will be tried, i.e. whether the master of the vessel was himself negligent. *See*, for example. Exhibits "1" and "2".

Plaintiffs contend that the language of the Order supports their interpretation, and also that no determination of the legal cause of the grounding can be made if only the master's navigation is considered.

There is no claim, no defense, and no issue that can be adjudicated to completion by considering only the master's navigation.

Plaintiffs have claimed breach of warranty and negligence against the HIRI defendants. They have claimed strict liability in tort against Sofec. Each cause of action is based upon a legal relationship between plaintiffs and a defendant. Without a determination of the legal relationships, there can be no determination of the appropriate standard of care to be applied. There can be no determination of proximate cause without a determination of the standard of care.

Because the determination of legal cause requires application of standards of care, plaintiffs must be given the opportunity to prove that the HIRI defendants should

be judged in light of their roles as safe berth warrantor, wharfingers, and contractors for services to the vessel.

Likewise, plaintiffs must be given the opportunity to prove that Sofec's acts and omissions should be judged in light of its status as the manufacturer of a defective product.

The evidence necessary to establish the status of the defendants, and thus their respective duties, includes matters which preceded the breakaway.

Once the duties of the parties have been established, the trier of fact must determine whether those duties were breached, and whether the breaches caused plaintiffs' losses. In most cases, the breaches which plaintiffs contend caused its losses preceded the chain failure.

Thus, no determination of cause, other than, possibly, whether the master's navigation was a cause in fact of the grounding, can be made by considering only evidence of the master's navigation.

## II. DISCUSSION

### A. THE LANGUAGE OF THE ORDER SUPPORTS PLAINTIFFS' INTERPRETATION.

The Order states:

... the motion to bifurcate is GRANTED so that the first phase of the trial will be limited to the issue of causation with respect to the EXXON HOUSTON's grounding, but not including the issue of causation with respect to the breakout itself.

It is difficult to understand how that language could be interpreted to mean that evidence will be limited to the Master's navigation following the breakout.

In its discussion, the Court did state:

On the other hand, if the court does not find that the navigation of the vessel was the superseding cause of the grounding, the court can still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel.

Order, page 15.

Defendants apparently base their interpretation of the Order on this language.

**B. THE TRIER OF FACT CANNOT DETERMINE CAUSE WITHOUT CONSIDERING MATTERS BEYOND THE MASTER'S NAVIGATION OF THE VESSEL.**

While the Order does not state that it is the legal cause, rather than physical cause, of the grounding that is to be determined in the first phase of the trial, plaintiffs assume that to be the Court's intention.

Proximate cause requires an examination of the acts of the parties in light of their responsibilities.

As noted by the Court of Appeals for the Ninth Circuit:

[Legal, or proximate, cause is] not primarily one of causation at all, since it does not arise until

cause in fact is established. It is rather one of the policy as to imposing legal responsibility." (quoting W. Keeton, D. Dobbs & D. Owen, *Prosser & Keeton on Torts*, § 42). (further citations omitted.) In short, "we are dealing with problems of responsibility, and not physics." *Prosser & Keeton* § 44 at 302.

*Hunley v. Ace Maritime* 927 F.2d 493, 497 (9th Cir. 1991).

In order to determine the appropriate standard to apply in imposing legal responsibility, the trier of fact must determine whether plaintiffs have met their burdens of proof as to their breach of warranty, strict liability in tort, and negligence claims.

The Court has apparently equated comparative fault with cause. Comparative fault, by its very definition, is not equivalent to causation. It applies unless the degree to which a particular act caused a loss can be determined. *Newby v. Kristen Gail*, 1992 AMC 149 at 154 (1991); *Protectus Alpha v. North Pacific* 1986 AMC 56 at 61 (1985).

Comparative fault is applied differently in connection with strict liability claims than with negligence claims. Because plaintiffs have negligence claims as well as strict liability claims, the trier of fact must consider the culpability of the parties before it can determine comparative fault.

**1. EVIDENCE RELEVANT TO STRICT LIABILITY CLAIMS.**

Plaintiffs' claims of breach of warranty and product liability do not require proof of wrongful conduct on the



defendants' part. Once plaintiffs have shown the existence of the duty, the breach of the duty, and the resultant loss, the defendants will have an opportunity to try to establish that the award of damages should be reduced in proportion to plaintiffs' alleged contribution to their loss. *Pan-Alaska v. Marine Construction*, 565 F.2d 1129, 1978 AMC 2315 (9th Cir., 1977).

In *Pan-Alaska* the Ninth Circuit ruled that where a defendant is found liable under a theory of strict products liability, and a plaintiff is found contributorily negligent in causing his loss, the doctrine of comparative fault can be applied as a partial defense. *Id.* at 2327.

The *Pan-Alaska* court ruled that if the plaintiff proved its case on remand, the defendant would be strictly liable for harm caused by a defective product, except that the damages could be reduced in proportion to the plaintiff's contribution to his loss. *Id.* at 2330. In evaluating the plaintiff's contribution, the court ruled, all of plaintiff's conduct should be considered, and its blameworthiness compared to the extent of the product's defect. *Id.* at 2331.

Logically, a similar approach would have to be taken in applying comparative fault as to plaintiffs' claims of breach of warranties.

In order to prove their claim of strict liability in tort, plaintiffs must also be given an opportunity to show that Sofec had the duty to plaintiffs as the manufacturer or a product, under §402-A of the *Restatement of Torts*, 2d. Plaintiffs must show Sofec's status as the manufacturer and seller of the SPM, the defects in the SPM, the lack of

material alteration in the product, and the causal connection with plaintiffs' loss. Again, the evidence will necessarily include matters which preceded the failure of the chain.

In order to prove their claims of breach of warranty of safe berth, plaintiffs will have to establish the terms of the contract extending the warranty of safe berth, its breach, and the causal connection with plaintiffs' loss.

As safe berth warrantor, the HIRI defendants had the strict contractual duty to provide a berth that was safe under all foreseeable conditions. Plaintiffs claim that the failure of the chain was a breach of the warranty, and proof of the failure in foreseeable conditions, though not necessarily the cause of the failure, will be required. Evidence in support of plaintiffs' claim that other conditions at the berth breached the warranty will also have to be considered.

Evidence of the advice given to the HIRI defendants by experts well before the breakaway, as well as evidence of the information available to the HIRI defendants from trade publications, must be considered in connection with the issue of foreseeability.

The defendants will undoubtedly offer evidence in an attempt to prove that plaintiffs' contributed in some manner to their loss. The standard of care applicable to the captain in connection with defendants' claims of contributory negligence is also dependent upon the duty of care owed to the vessel by the defendants. Plaintiffs' conduct will have to be judged in light of their right to rely upon the warranty of safe berth. *Paragon Oil Co. v. Republic Tankers, S.A.* 310 F.2d 169 (2d Cir 1962). If the

captain was reasonable in relying upon a safe berth warranty, his duty of care was less. *Id.* The captain's standard of care is also affected by whether the vessel was placed in *extremis* by the defendants. *The Oregon* 158 U.S. 186 (1895); *The Genesee Chief v. Fitzhugh* 53 U.S. 443 (1851).

If defendants are successful in establishing that plaintiffs contributed to their loss, the damages awarded plaintiffs will be reduced in proportion to plaintiffs' fault.

## 2. EVIDENCE RELEVANT TO PLAINTIFFS' CLAIMS OF NEGLIGENCE

In order to prevail on their negligence claims, plaintiffs must prove culpable conduct on the part of one or more HIRI defendants. The defendants have alleged negligent conduct on the plaintiffs' part, which, if proved, would reduce plaintiffs damages on a comparative fault basis.

In order to determine comparative fault in connection with the plaintiffs' negligence claims, the Court must consider the *culpability* of the parties. *United States v. Reliable Transfer Co.* 1975 AMC 541 (1975); *Newby v. F/V Kristen Gail*, *supra*; *Pan-Alaska v. Marine Const. & Design Co.* 565 F.2d 1129, 1978 AMC 2315 (9th Cir., 1977).

Before any determination can be made concerning plaintiffs' negligence claims, the trier of fact must determine HIRI's legal duties toward the plaintiffs. Only then can the Court determine the appropriate standard of care to be applied to HIRI's conduct and whether the conduct met that standard of care.

As wharfinger, the HIRI defendants had a duty to use due diligence to ensure a safe berth. As a contractor for services to the vessel, the HIRI defendants had a duty to perform in a workmanlike manner. Plaintiffs must be given an opportunity to proof [sic] the relationships between themselves and the various HIRI defendants. They must also be given a opportunity to establish the conduct necessary to meet the standards of care associated with the HIRI defendants' roles.

Once the legal duties are established, plaintiffs must be given an opportunity to show the breach of those duties. Thereafter, defendants will probably seek to establish wrongful conduct on the part of the plaintiffs. Only with all the evidence pertaining to the culpability of the parties before it can the trier of fact then determine whether plaintiffs' damages should be reduced on a comparative fault basis.

Evidence relevant to plaintiffs' negligence claims will include the advice and information provided to the HIRI defendants as that advice and information pertains to their conduct, and all of their acts and omissions to the extent they influenced events that followed the failure of the chafe chain. Without an understanding of the HIRI defendants' acts during the design, procurement and pre-incident operation periods, no evaluation of their *negligence* can be made.

The trier of fact must consider all the problems with the trailing hose and who was responsible for it, the role and performance of the mooring master and his relationship to the ship, whether the mooring master was adequately trained, the lack of a contingency plan setting



forth options in the event of bad weather or a mooring failure, the inadequacy of the assist boats, and the existence of and reliance on a safe berth warranty. Defendants will presumably seek to introduce evidence concerning plaintiffs' allegedly wrongful conduct.

← 3. EVIDENCE RELEVANT TO DEFENSES OF SUPERSEDING CAUSE AND SEPARATE CAUSE

Defendants have asserted that the grounding resulted from a separate cause or a superseding cause. The Court denied Bridon's Cross Motion For Partial Summary Judgment, finding that Bridon had not established as a matter of law either separate cause or superseding cause. Thus, evidence concerning those defenses must be considered in determining the cause of the grounding.

As recognized in *Hunley v. Ace Maritime Corp.* 927 F.2d 493 (9th Cir. 1991) and by this Court, intervening superseding cause may only be proved if the captain was extraordinarily negligent and his negligence and resulting damages were not normal or foreseeable consequences of the initial torts committed.

Plaintiffs assert that the chain failure, the trailing hose, the mooring master's advice and later absence, the lack of any contingency plan, the inadequacy of the defendants' response to the breakout, the lack of adequate assist vessels, and the defects in the SPM, both known and unknown by HIRI, were all causes of the grounding. Evidence of all of those causes, and the HIRI defendants' culpability as to each of them, along with the

foreseeable consequences of those torts, must be considered.

Evidence of environmental conditions at the berth will be relevant to the issue of what consequences were foreseeable. The mooring master's training and advice must also be considered. The characteristics and actions of the assist vessel and its crew, as well as HIRI's shore-side personnel, must be considered. The trailing hose, and the danger it posed, is relevant to a determination of superseding cause.

Another complete defense urged by the defendants is separate cause. To prove separate cause, defendants must show all negligent or otherwise legally culpable forces attributable to any or all the defendants had *ceased to operate* at the time the damage occurred. See *Protectus Alpha Navigation v. North Pacific Grain Growers Ass'n.*, 767 F.2d 1379 (9th Cir. 1986).

Here, again, in order to determine whether causes attributable to the defendants caused the grounding, the trier of fact must determine the natural and probable consequences of the defendants' conduct, including all the evidence considered in connection with the defense of superseding cause.

IV. IT IS UNCLEAR WHETHER THE FIRST PHASE OF BIFURCATION WILL BE TO A JURY.

Plaintiffs do not take any position at this time as to whether Defendant Sofec is entitled to a jury trial of all the issues in this litigation. However, it does not appear



that Sofec has conceded to a nonjury trial in the first phase of bifurcation.

Sofec has filed a Statement of Clarification that states it would waive jury trial in the first phase if the case is bifurcated *temporally* before and after the point of the breakaway. However, it is evident from the Court's Order granting the motion to bifurcate, and from the discussion above, that plaintiffs will be able to introduce evidence of fault on the part of Sofec that occurred before the breakaway. It seems, therefore, that a jury would have to be impanelled for the first phase.

#### IV. CONCLUSION

Plaintiffs seeks clarification that the only issues and evidence to be excluded from the first phase of a bifurcated trial are those pertaining to damages and the cause of the chain breaking. Such a bifurcation will exclude a great deal of expert testimony, thereby saving both the Court and the parties time and expense in the first phase.

It is requested the clarifying Order specifically state that all evidence of all claimed causes of the grounding will be admitted, that all evidence necessary to prove breach of warranty of safe berth and strict products liability be admitted, and that all evidence of the degree of culpability of each party in causing the grounding also be admitted.

Plaintiffs also requests that the Order state the following evidence is admissible : (1) all evidence concerning the contractual relationship between plaintiffs and

the HIRI defendants; (2) all evidence concerning the services and the quality of those services the HIRI defendants provided to plaintiffs and their vessel; (3) all evidence concerning the training, duties, and conduct of the mooring master and his relationship to the vessel; (4) all evidence concerning the adequacy of the design, operation, maintenance and physical components of the SPM, excluding only the chain; and (5) all information given by the HIRI defendants to plaintiffs and relied upon by the vessel master in making navigational decisions; and (6) all evidence in support of plaintiffs' claim against Sofec pursuant to § 402-A of the *Restatement of Torts, 2d* except for evidence of the cause of the chafe chain failure.

Finally, plaintiffs seeks clarification as to whether the bifurcated phase will be tried to a jury, and whether trial of remaining liability issues will commence immediately following the verdict in the first phase.

DATED: August 10, 1992; Honolulu, Hawaii.

/s/ Judy S. Givens  
JUDY S. GIVENS  
Of Attorneys for  
Plaintiffs  
EXXON SHIPPING  
COMPANY, INC.  
and EXXON COMPANY,  
U.S.A.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING	)	CIVIL NO.:
COMPANY and EXXON	)	90-00271 HMF
COMPANY, U.S.A. (A	)	IN ADMIRALTY
Division of Exxon	)	AFFIDAVIT OF
Corporation),	)	JUDY S. GIVENS;
	)	EXHIBITS
Plaintiffs,	)	"1" AND "2"
vs.	)	
PACIFIC RESOURCES, INC.,	)	
HAWAIIAN INDEPENDENT	)	
REFINERY, INC., PRI	)	
MARINE, INC., PRI	)	
INTERNATIONAL, INC.,	)	
and SOFEC, INC.,	)	
Defendants,	)	
PACIFIC RESOURCES, INC.;	)	
HAWAIIAN INDEPENDENT	)	
REFINERY, INC.; PRI	)	
MARINE, INC.; and PRI	)	
INTERNATIONAL, INC.,	)	
Third-Party	)	
Plaintiffs,	)	
vs.	)	
BRIDON FIBRES AND	)	
PLASTICS, LTD., GRIFFIN	)	
WOODHOUSE, LTD., and	)	
WERTH ENGINEERING,	)	
INC.,	)	
Third-Party	)	
Defendants.	)	

AFFIDAVIT OF JUDY S. GIVENS

STATE OF HAWAII )  
 ) SS.  
CITY AND COUNTY OF HONOLULU )

JUDY S. GIVENS, being first duly sworn upon oath,  
deposes and states as follows:

1. I am an attorney licensed to practice law before  
this Court and am one of the attorneys for Plaintiffs in the  
above entitled action.

2. I make each of the following statements based on  
personal knowledge unless otherwise expressly indi-  
cated.

3. Attached hereto as Exhibit "1", is a true and  
correct copy of Defendant SOFEC, INC.'s Statement of  
Clarification Re: Demand for Jury Trial; Certificate of  
Service.

4. Attached hereto as Exhibit "2", is John R. Lacy's  
letter to Judy S. Givens, Esq., dated August 6, 1992.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Judy S. Givens  
JUDY S. GIVENS

Subscribed and sworn before me this 10th day of August,  
1992.

/s/ Illegible  
Notary Public, State of Hawaii  
My commission expires: 11-25-94

**EXHIBIT "1"**

MICHAEL D. TOM 1655-0  
 RANDALL K. SCHMITT 3752-0  
 BRAD S. PETRUS 4586-0  
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Attorneys for Defendant  
 SOFEC, INC.

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII

EXXON SHIPPING	)	CIVIL NO. 90-00271
COMPANY and EXXON	)	HMF
COMPANY, U.S.A. (A	)	DEFENDANT SOFEC,
Division of Exxon	)	INC.'S STATEMENT
Corporation),	)	OF CLARIFICATION
Plaintiffs,	)	RE: DEMAND FOR
vs.	)	JURY TRIAL;
PACIFIC RESOURCES, INC.,	)	CERTIFICATE OF
HAWAIIAN INDEPENDENT	)	SERVICE
REFINERY, INC., PRI	)	(Filed
MARINE, INC., PRI	)	Jul. 30, 1992)
INTERNATIONAL, INC.,	)	Trial Date:
and SOFEC, INC.,	)	October 13, 1992
Defendants,	)	

PACIFIC RESOURCES, INC.;	)
HAWAIIAN INDEPENDENT	)
REFINERY, INC.; PRI	)
MARINE, INC.; and PRI	)
INTERNATIONAL, INC.,	)
Third-Party	)
Plaintiffs,	)
vs.	)
BRIDON FIBRES AND	)
PLASTICS, LTD., GRIFFIN	)
WOODHOUSE, LTD., and	)
WERTH ENGINEERING,	)
INC.,	)
Third-Party	)
Defendants.	)

DEFENDANT SOFEC INC.'S STATEMENT OF  
CLARIFICATION RE: DEMAND FOR JURY TRIAL

Comes now, Defendant SOFEC Inc. ("Sofec"), by and through its attorneys, McCorrison Miho & Miller, and for clarification of its demand for jury trial, states that if this matter were bifurcated temporally on issues before and after the point of the breakaway of the *Exxon Houston* from its mooring at the Single Point Mooring ("SPM") owned and operated by Defendant HAWAIIAN INDEPENDENT REFINERIES INC. ("HIRI") as requested by Third-Party Defendant GRIFFIN WOODHOUSE LTD. in its Motion for Bifurcation or in the Alternative to Continue Trial filed on June 3, 1992 and which was heard before this Court on July 27, 1992, Sofec waives any right it may have with respect to a jury trial on issues of causation after the point of the breakaway. Sofec reserves



its right to a jury trial on issues of causation arising prior to and up to the actual point of breakaway of the *Houston* from the HIRI SPM.

DATED: Honolulu, Hawaii, Jul 30, 1992,

/s/ Randall K. Schmitt  
 MICHAEL D. TOM  
 RANDALL K. SCHMITT  
 BRAD S. PETRUS  
 Attorneys for Defendant  
 SOFEC, INC.

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IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY and	)	CIVIL NO.
EXXON COMPANY, U.S.A. (A	)	90-00271 HMF
Division of Exxon Corporation,	)	
Plaintiffs,	)	CERTIFICATE
	)	OF SERVICE
vs.	)	
PACIFIC RESOURCES, INC.,	)	
HAWAIIAN INDEPENDENT	)	
REFINERY, INC., PRI MARINE,	)	
INC., PRI INTERNATIONAL, INC.,	)	
and SOFEC, INC.	)	
Defendants,	)	
vs.	)	
PACIFIC RESOURCES, INC.;	)	
HAWAIIAN INDEPENDENT	)	
REFINERY, INC.; PRI MARINE,	)	
INC.; and PRI INTERNATIONAL,	)	
INC.,	)	
Third-Party	)	
Plaintiffs,	)	
vs.	)	
BRIDON FIBRES AND PLASTICS,	)	
LTD., GRIFFIN WOODHOUSE, LTD.,	)	
and WERTH ENGINEERING, INC.,	)	
Third-Party	)	
Defendants.	)	

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by hand delivery/mail to the following counsel on JUL 30 1992.

LEONARD F. ALCANTARA, ESQ.  
JUDY S. GIVENS, ESQ.  
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PRI INTERNATIONAL, INC. and  
HAWAIIAN INDEPENDENT REFINERY, INC.

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Attorneys for Defendant and Third-Party Defendant  
GRIFFIN WOODHOUSE, LTD.

DATED: Honolulu, Hawaii, JUL 30 1992.

/s/ Randall K. Schmitt  
MICHAEL D. TOM  
RANDALL K. SCHMITT  
BRAD S. PETRUS  
Attorneys for Defendant  
SOFEC, INC.

---

**EXHIBIT "2"**

GOODSILL ANDERSON QUINN &amp; STIFEL

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[Names Omitted In Printing]

August 6, 1992

Judy S. Givens, Esq.  
Alcantara & Frame  
Pioneer Plaza, Suite 1100  
900 Fort Street Mall  
Honolulu, Hawaii 96813RE: Exxon Shipping vs. Pacific Resources, et al.

Dear Judy:

This will acknowledge your August 6, 1992 letter. In my view, Judge Fong's decision was intended to limit the first trial to navigation issues. The purpose of my motion was to limit future discovery to activity occurring after the breakaway of the Exxon Houston from the mooring. The multitude of other issues including such things as breakaway couplings, SPM design, metallurgy, etc. are in my view not relevant to Captain Dick's navigation of the vessel once he was away from the buoy on March 2.

I realize Exxon will attempt to defend Captain Dick by pointing to the trailing hose but I view that as nothing

more than a defense to his conduct. Why a trailing hose was present is not relevant to the navigation issue. The core issue for the first trial is whether Captain Dick acted prudently under the circumstances which would include at least for a portion of the time the trailing hose. I can understand why Exxon would promote trying to bring in other issues since it is now faced with the difficult task of defending Captain Dick's conduct. However, I would also suggest that it is in Exxon's economic interest to have the navigation issue resolved quickly and as inexpensively as possible so that the parties can better frame the settlement issues in this case.

On behalf of Griffin Woodhouse I will have to oppose any effort by Exxon to expand the scope of the first trial. I hope Exxon will reconsider its decision to place additional burdens on the Court as well as the parties by asking for an expansion of the issues to be determined at the first trial.

Very truly yours,

/s/ John  
John R. Lacy

JRL:set

cc: All counsel

(Certificate of Service omitted in printing.)  

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY ) and EXXON COMPANY, U.S.A. ) (A Division of Exxon ) Corporation), )  <div style="text-align: right; padding-right: 20px;">Plaintiffs,</div> <div style="text-align: center;">vs.</div> PACIFIC RESOURCES, INC.; ) HAWAIIAN INDEPENDENT ) REFINERY, INC.; PRI MARINE ) INC.; PRI INTERNATIONAL, ) INC.; and SOFEC, INC., )  <div style="text-align: right; padding-right: 20px;">Defendants.</div> <div style="text-align: center;">and</div> PACIFIC RESOURCES, INC.; ) HAWAIIAN INDEPENDENT ) REFINERY, INC.; PRI MARINE ) INC, and PRI INTERNATIONAL, ) INC., )  <div style="text-align: right; padding-right: 20px;">Third-Party ) Plaintiffs,</div> <div style="text-align: center;">vs.</div> BRIDON FIBRES AND ) PLASTICS, LTD.; GRIFFIN ) WOODHOUSE, LTD. and ) WERTH ENGINEERING, INC., )  <div style="text-align: right; padding-right: 20px;">Third-Party ) Defendants.</div>	Civil No. 90-00271 HMF     (Filed Aug. 27, 1992)
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ORDER DENYING PLAINTIFFS' MOTION  
FOR CLARIFICATION

On July 31, 1992, the court entered an order granting defendants' motion to bifurcate. On August 10, 1992, plaintiffs Exxon Shipping Company and Exxon Company, U.S.A. (collectively "Exxon") filed a motion for clarification of the July 31, 1992 Order. Defendant Sofec, Inc. ("Sofec") filed a memorandum in opposition on August 13, 1992; defendant and third-party defendant Bridon Fibres and Plastics, Ltd. ("Bridon") filed a memorandum in opposition on August 17, 1992; third-party defendant Griffin Woodhouse, Ltd. ("Griffin") filed a memorandum in opposition on August 18, 1992; and defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc. and PRI International, Inc. (collectively "HIRI") filed a memorandum in opposition on August 19, 1992. Exxon filed a memorandum in reply to Bridon's opposition memorandum on August 20, 1992, and filed memoranda in reply to the remaining opposition memoranda on August 21, 1992.

By its motion, Exxon moves the court to clarify its previous Order, issued on July 31, 1992, so that the first phase of the trial would contemplate all evidence related to the cause(s) of the grounding of the EXXON HOUSTON other than the evidence related to the cause of the parting of the Type "C" chafe chain. The court, however, bifurcated the trial so that it could consider the conditions that existed and the events that occurred after the breakout separately from those that preceded the breakout. It should have been clear from the July 31, 1992 Order that all evidence related to the conditions that existed and the events that occurred after the breakout

will be admissible in the first phase of the bifurcated trial. In its July 31, 1992 Order, the court employed the term "breakout" to refer to the moment at which the second oil hose connecting the EXXON HOUSTON to the SPM broke.

Accordingly, the motion for clarification is DENIED.  
IT IS SO ORDERED.

DATED: Honolulu, Hawaii, AUG 27 1992

/s/ Harold M. Fong  
UNITED STATES  
DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY )  
and EXXON COMPANY, U.S.A. )  
(A Division of Exxon )  
Corporation), )

Plaintiffs, )

vs. )

PACIFIC RESOURCES, INC.; )  
HAWAIIAN INDEPENDENT )  
REFINERY, INC.; PRI MARINE )  
INC.; PRI INTERNATIONAL, )  
INC.; and SOFEC, INC., )

Defendants. )

and )

PACIFIC RESOURCES, INC.; )  
HAWAIIAN INDEPENDENT )  
REFINERY, INC.; PRI MARINE )  
INC, and PRI INTERNATIONAL, )  
INC., )

Third-Party )  
Plaintiffs, )

vs. )

BRIDON FIBRES AND )  
PLASTICS, LTD.; GRIFFIN )  
WOODHOUSE, LTD. and )  
WERTH ENGINEERING, INC., )

Third-Party )  
Defendants. )

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Civil No.  
90-00271 HMF

ORDER GRANTING IN PART DEFENDANTS PACIFIC  
RESOURCES, INC., HAWAIIAN INDEPENDENT  
REFINERY, INC., PRI MARINE INC. AND PRI  
INTERNATIONAL, INC.'S MOTION FOR PARTIAL  
SUMMARY JUDGMENT AND GRANTING IN PART  
PLAINTIFFS EXXON SHIPPING COMPANY, INC.  
AND EXXON COMPANY, U.S.A'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT

(Filed Oct. 9, 1992)

INTRODUCTION

On September 21, 1992, the court heard plaintiffs Exxon Shipping Company, Inc. and Exxon Company, U.S.A.'s (collectively "Exxon") motion for partial summary judgment against defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine Inc. and PRI International, Inc.'s Motion for Partial Summary Judgment (collectively the HIRI defendants) filed on August 3, 1992. Exxon filed a supplemental memorandum on August 17, 1992. Griffin Woodhouse, Ltd. ("Griffin") filed a statement of no position on August 26, 1992. The HIRI defendants filed a memorandum in opposition on September 3, 1992. Exxon filed a memorandum in reply on September 10, 1992. Bridon Fibres & Plastics, Ltd. ("Bridon") filed a statement of no position on September 15, 1992, and Sofec, Inc. ("Sofec") filed a statement of no position on September 17, 1992; [sic]

On September 21, 1992, the court also heard the HIRI defendants' motion for partial summary judgment filed on August 5, 1992. Sofec filed a joinder in the motion on August 28, 1992. Exxon filed a memorandum in opposition on September 3, 1992. Griffin filed a statement of no position on August 26, 1992. The HIRI defendants filed a

memorandum in reply on September 10, 1992. Bridon filed a statement of no position on September 15, 1992, and Sofec filed a statement of no position on September 17, 1992. In response to the court's instruction made on September 22, 1992, Exxon and the HIRI defendants filed supplemental memoranda on September 25, 1992.

BACKGROUND

This case arises out of the March 2, 1989 breakaway of the EXXON HOUSTON, which was owned and operated by Exxon, from HIRI's single point mooring (SPM) at Barber's Point and subsequent grounding approximately three hours later. The breakaway occurred when a Type "C" chafe chain, which was used to connect the SPM to the EXXON HOUSTON, parted. Post-accident, destructive testing of the chain has indicated that the welds of the chain links *may* have been defective.

DISCUSSION

I. STANDARD FOR SUMMARY JUDGMENT

Rule 56(c) of the Federal Rules of Civil Procedure provides that summary judgment shall be entered when:

... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The moving party has the initial burden of "identifying for the court those portions of the materials on file that it



believes demonstrate the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986)). The movant need not advance affidavits or similar materials to negate the existence of an issue on which the opposing party will bear the burden of proof at trial. *Celotex*, 477 U.S. at 323, 906 S. Ct. at 2553.

If the moving party meets its burden, then the opposing party must come forward with "specific facts showing that there is a genuine issue for trial" in order to defeat the motion. Fed. R. Civ. P. 56(e); *T.W. Elec.*, 809 F.2d at 630. The opposing party cannot stand on the pleadings nor simply assert that it will discredit the movant's evidence at trial. *Id.* "If the factual context makes the [opposing] party's claim implausible, that party must come forward with more persuasive evidence than would otherwise be necessary to show that there is a genuine issue for trial." *Cal. Arch. Bldg. Prods. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987) (citing *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356 (1986)).

The standard for summary judgment reflects the standard governing a directed verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 2512 (1986)). When there is a genuine issue of material fact, "the judge must assume the truth of the evidence set forth by the [opposing] party with respect to that fact." *T.W. Elec.*, 809 F.2d at 631. Inferences from the facts must be drawn in the light most favorable to the non-moving party. *Id.*

## II. EXXON'S MOTION FOR PARTIAL SUMMARY JUDGMENT AGAINST HIRI

By its motion, Exxon seek [sic] "an order holding, as a matter of law, that (1) PRII [PRI International, Inc.] extended an express contractual warranty of safe berth to the EXXON HOUSTON and ESC [Exxon Shipping Company], (2) that HIRI [Hawaiian Independent Refinery, Inc.] and PRI are also bound by the express contractual warranty of safe berth in the relevant contact between Exxon Corporation and PRII, and (3) that the warranty was breached upon the breaking of the chafing chain on March 2, 1989." Memorandum in Support of Motion for Partial Summary Judgment at 3-4.

As a preliminary matter, the court would observe that Exxon's motion seeks to assign liability for the breakout to HIRI. The court's July 31, 1992 Order bifurcated the trial into two phases – pre-breakout and post-breakout – in order to resolve the post-breakout issues first. As such, the court declines to consider which party is legally responsible for the breakout until after the first phase of the trial has been completed. Nevertheless, the court must determine whether a warranty of safe berth remained in force and effect following the breakout insofar as such warranty would bear on the court's consideration of post-breakout issues.

Exxon contends that PRII extended an express contractual warranty of safe berth to EUSA;<sup>1</sup> however, the

<sup>1</sup> The HIRI defendants concede that EUSA contracted with PRII to sell crude oil products to PRII and to supply crude oil tankers to deliver the oil to a terminal designated by PRII.

multi-layered corporate structure surrounding both PRII and ESC complicates the inquiry into whether HIRI and PRI were also bound to provide "safe berth" to the EXXON HOUSTON. A brief review of the corporations involved is warranted. EUSA [Exxon Company, U.S.A.] does not own any vessels but rather trades in petroleum products. EUSA has a contract of affreightment with ESC pursuant to which ESC vessels carry petroleum products on behalf of EUSA. The EXXON HOUSTON was an ESC vessel. PRII, part of the Petroleum Business Group of PRI, operates as the buyer and seller of crude oil products for HIRI - PRI's subsidiary and refinery. PRII does not own any berths.<sup>2</sup>

Exxon argues that the safe berth clause in the telex contract between EUSA and PRII was clearly intended to benefit the EXXON HOUSTON because the contract explicitly stated it was meant to apply to vessels nominated by the delivering party - EUSA. Exxon also argues that the close relationship between PRII and HIRI, both subsidiaries of PRI, and the most reasonable interpretation of the telex contract require the court to find that the safe berth clause bound HIRI, which operated the SPM, as well as PRII, which did not own any berth.

The HIRI defendants protest that Exxon's reasoning disregards corporate formalities and argue, instead, that

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<sup>2</sup> According to the HIRI defendants, "[i]t was not uncommon for PRII to purchase oil products for probable sale and delivery to HIRI, which products would, in fact, after purchase by PRII, be sold by PRII to another refinery and delivered to the port and terminal of the alternate buying party." Memorandum in Opposition at 3-4.

PRII, PRI and HIRI are separate legal entities that do not necessarily bind one another in contract. Absent fraud or bad faith, the HIRI defendants continue, a corporation will not be held liable for the contracts of its subsidiaries, parents, or affiliates. On this basis, the HIRI defendants conclude that HIRI and PRI are not parties to the contract executed between PRII and EUSA and, therefore, are not bound by the express warranty of safe berth.

Presently, the court need not resolve the dispute, which will require resolution only in the event that PRII, if held to be liable under the warranty, is unable to pay the full amount of a money judgment assessed against it. Instead, the court now considers whether the warranty of safe berth remained in force and effect after the breakout regardless of which party was (or will be held) legally responsible for the breakout.

The HIRI defendants contend that Captain Dick failed to follow the ballasting parameters set forth in the HIRI Terminal Manual to minimize stress on the chafe chain. The HIRI defendants' sole source of evidence in this regard is taken from the Marine Board of Investigation Report, which is inadmissible as evidence. *Huber v. United States*, 838 F.2d 398 (9th Cir. 1988) (holding that coast guard investigative reports are inadmissible as evidence in criminal and civil actions). In their opposition memorandum, the HIRI defendants, however, do not suggest that the alleged ballasting failure itself constituted an intervening cause that would supersede the warranty of safe berth. The HIRI defendants argue that Captain Dick's ballasting commands were simply negligent rather than extraordinarily negligent. As such, the HIRI defendants have not raised a genuine issue of material fact



that, at the time of the breakout, the warranty of safe berth had been superseded by Exxon's allegedly negligent acts with respect to ballasting.

At this juncture, however, the court need not determine, as a final matter, whether the warranty of safe berth was superseded by Exxon's acts prior to the breakout because the court holds as a matter of law, that a superseding force prior to the breakout does not "forgive" or otherwise excuse subsequent breaches of the warranty of safe berth. In other words, irrespective of which forces caused the breakout, the warranty of safe berth remained in force and effect, and could be breached, during the period of time following the breakout. In this regard, the court adopts the analysis set forth in Exxon's supplemental memorandum at pages 9 through 12.<sup>3</sup> For example, if the mooring master was incompetent because of insufficient skill, training, or experience, or if the assist vessels were undersized and underpowered, such acts and/or omissions might be covered by the warranty of safe berth notwithstanding Exxon's responsibility, if any, for the breakout.

Accordingly, for the reasons articulated above, Exxon's motion for partial summary judgment is GRANTED IN PART.<sup>4</sup>

<sup>3</sup> In their supplemental memorandum, the HIRI defendants declined to address those breaches of the warranty of safe berth that are *subsequent* to a superseding cause. The court recognizes the possibility that the HIRI defendants concurred in Exxon's analysis of the issue.

<sup>4</sup> The court is well aware that several of the issues raised in Exxon's motion – whether HIRI is bound by the warranty of safe

### III. THE HIRI DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT

The HIRI defendants move for partial summary judgment on the grounds that any negligence of the mooring masters or the assist or standby vessels in this case should be imputed to the shipowner – Exxon – and not HIRI. When the EXXON HOUSTON arrived at the SPM, Captain Dick, the master of the vessel, signed on behalf of Exxon a document entitled "General Instructions, Discharging/Loading Orders and Indemnification." The General Instructions signed by Captain Dick contains the following indemnification agreement:

**INDEMNIFICATION.** It is understood and agreed by you on behalf of the vessel and its owners that the Mooring Master, operators and crew of the tugs, assist and standby launches, and said launches and tugs, are supplied upon the condition that in the performance of any service they may render to your vessel, that they are the servants of the vessel and its owners in every respect and not the servants of Hawaiian Independent Refinery, Inc., Pacific Resources Terminals, Inc., Pacific Resources, Inc., or its subsidiaries, or the owners of said launches. It is further agreed that the vessel and its owners

berth, whether the parting of the chafe chain constituted a breach of the warranty of safe berth, the scope of the warrantor or charterer's legal obligations pursuant to the warranty of safe berth – are not resolved herein. These issues, however, need not be resolved in order for the litigants to prepare for the first phase of the bifurcated trial now that the court has ruled that it will consider evidence relating to the warranty of safe berth or breach(es) thereof.



shall indemnify and hold harmless Hawaiian Independent Refinery, Inc., Pacific Resources Terminals, Inc., Pacific Resources, Inc., and its subsidiaries, and the owners of the assist and standby launches, from any liability, loss, claims or damages arising out of the rendering of services to your vessel by said Mooring Master, operators, crews and launches, whether or not arising out of the fault of said Mooring Master, operators, crew or said indemnitees. In addition, it is expressly agreed that the presence of the Mooring Master on board in no way relieves you, the Master of the vessel, of any legal responsibilities. FINAL DECISIONS REMAIN YOUR PREROGATIVE.

The express language of the Indemnification agreement makes it clear that the mooring masters and the assist or standby launches are servants of the vessel. According to the HIRI defendants, the agreement operates to shift all liability to Exxon for any negligence on the part of the HIRI mooring master or on the part of the launches provided to assist the EXXON HOUSTON.

For legal authority, the HIRI defendants rely entirely upon the Ninth Circuit's decision in *Kane v. Hawaiian Independent Refinery, Inc.*, 690 F.2d 722 (9th Cir. 1982). In *Kane*, a lineboat crewman was killed during the mooring of a tanker at HIRI's offshore petroleum products terminal at Barbers Point. The trial court held that the shipowner's liability was based, in part, upon the negligence of the mooring master assigned by HIRI to assist in the mooring of the vessel. The shipowner appealed contending that the mooring master's negligence should have been imputed to HIRI based on an implied warranty of workmanlike service.

On appeal, the Ninth Circuit recognized that the negligence of the mooring master is generally imputed to his employer, rather to the shipowner, where the employer hires, trains and assigns the mooring master, and requires the shipowner to use his services. The appellate court held, however, that this rule is inapplicable where the parties have agreed to shift their liability by signing a pilotage clause. 690 F.2d at 723 (citing *Sun Oil Co. v. Dalzell Towing Co.*, 287 U.S. 291, 294-95, 53 S. Ct. 135, 77 L.Ed.2d 311 (1932)).

In *Kane*, the master of the vessel signed a "Pilotage Service Statement" prior to the mooring. The shipowner argued that the agreement was invalid because it was not freely bargained for in that (1) all vessels mooring at HIRI's berth were required to use the services of one of its mooring masters, (2) the shipowner did not request the services of a mooring master, (3) the pilotage clause and general instructions were given to the master of vessel only after the mooring master boarded the vessel, and (4) there were no prior dealings between the parties. There was also evidence at trial that the clause was not explained to the vessel's captain and that he spoke little English. The appellate court soundly rejected the shipowner's claim of compulsion by reasoning that "[a]ll parties were familiar with the custom of the industry regarding liability of pilots and mooring masters and cannot be heard to say that they were ignorant of the practice of attributing mooring masters' negligence to the shipowner." 690 F.2d at 724. The *Kane* court also explained the policy reasons underlying its decision in the following terms:

HIRI has a legitimate interest in limiting its liability for damage caused by a large vessel moving under its own power. Imposition of such liability would have negligible deterrent value since HIRI already has ample incentive to avoid accidents in its own products terminal. . . .

Moreover, there are substantial policy interests in permitting the parties to allocate risks among themselves, both in terms of acquisition and retention of appropriate insurance coverage and of effective management of sea-going vessels. When access to insurance is considered, it is apparent that the pilotage clause assigned risk consistently with standard coverage, since the insurance commonly carried by sea-going vessels covers accidents under pilotage. There is every reason, therefore, to avoid drawing fine distinctions between the relative negligence of captain and mooring master when the two are in joint control of a ship's movement.

690 F.2d 724-25 (citations omitted). In light of *Kane*, the court concludes that any negligence committed by the Master Marvin or the assist or standby vessels, at least after the breakout, must be imputed to Exxon.

As a preliminary matter, Exxon refuses to concede that the pilotage clause should be recognized and enforced by the court. Exxon argues that the pilotage clause is unenforceable because it was not bargained for; however, *Kane* compels the court to reject Exxon's argument. Exxon attempts to distinguish *Kane* on the issue of compulsion by arguing that Exxon and HIRI had a prior agreement whereas the parties in *Kane* did not. As such, Exxon concludes that the pilotage clause was unsupported by consideration and, therefore, enforceable given

the extensive negotiations surrounding the telex contract, which guaranteed the EXXON HOUSTON's right to use the SPM. The argument cuts both ways. Any claim of surprise would be disingenuous in this case because Captain Dick, commanding the EXXON HOUSTON, allegedly docked at HIRI's SPM on several occasions prior to March 2, 1989. Furthermore, the court finds that there was adequate consideration that supported the pilotage clause. Although the EXXON HOUSTON may arguably have had a legal right to moor at the SPM pursuant to the telex contract, the EXXON HOUSTON, as a *practical* matter, would not have been allowed to moor at the SPM without Captain Dick having signed the pilotage clause.

As an alternative basis for denying summary judgment, Exxon argues that the warranty of safe berth, discussed earlier, precludes the assignment of the mooring master and the assist vessels' negligence to the EXXON HOUSTON. To the extent that the negligence of the mooring master or the assist vessels can be characterized as a breach of the warranty of safe berth, the court agrees that the HIRI defendants are not entitled to *summary judgment* on the issue of imputation. *California v. S/T Norfolk*, 435 F. Supp. 1039 (N.D. Cal. 1977); *United States v. GTS Adm. Wm. Callaghan*, 638 F. Supp. 687 (S.D.N.Y. 1986); *Ore Carriers of Liberia, Inc. v. Navigen Corp.*, 332 F. Supp. 71 (S.D.N.Y. 1969); see also *British Columbia Co. v. Mylroie*, 259 U.S. 1, 11-12 (1921) (concluding that tug boat pilot's negligence fell short of reasonable assistance guaranteed by charterer even though parties had signed general indemnification agreement). For example, as noted earlier, if the mooring master was incompetent because of insufficient skill, training, or experience, or if the assist vessels were



undersized and underpowered, such acts and/or omissions might be covered by the warranty of safe berth. On the other hand, where the conduct of the mooring master or assist vessels cannot be fairly linked to the warranty of safe berth – simple negligence, for example – the court holds that such negligence must be imputed to Exxon. Prior to trial, however, the court cannot determine where there is a potential overlap between the warranty and pilotage clauses.

Accordingly, the HIRI defendants' motion for partial summary judgment is GRANTED IN PART as and for the reasons stated above.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, OCT 9 1992

Harold M. Fong  
UNITED STATES  
DISTRICT JUDGE

Leonard F. Alcantara – #1521  
Robert G. Frame – #1449  
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Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING	)	CIVIL NO.
COMPANY, INC., et al.	)	90-00271 HMF
Plaintiffs,	)	
vs.	)	PLAINTIFFS'
PACIFIC RESOURCES,	)	MEMORANDUM
INC., et al.	)	CONCERNING PHASE
Defendants	)	OF BIFURCATED TRIAL
and	)	IN WHICH EVIDENCE
PACIFIC RESOURCES,	)	CONCERNING GALL
INC. et al.	)	THOMSON COUPLINGS
Third-Party	)	SHOULD BE
Plaintiffs,	)	CONSIDERED;
vs.	)	DECLARATION OF
BRIDON FIBRES AND	)	COUNSEL; EXHIBITS "A"
PLASTICS, LTD. et al.	)	THROUGH "H";
Third-Party	)	CERTIFICATE OF
Defendants.	)	SERVICE
	)	(Filed
	)	Dec. 2, 1992)
	)	DATE: December 8, 1992
	)	TIME: 9:00 a.m.
	)	JUDGE: Harold M. Fong



\* \* \*

hoses did not part. The mooring masters were certainly aware, however, of the danger that the cargo hoses would fail. *Id.*

Despite clear evidence that operating within the specified environmental limitations was not adequate protection against mooring failures, and the obvious fact that once the mooring failed the cargo hoses might well be ripped apart, HIRI continued to operate the berth without adopting any precautions against subsequent mooring failures.

Six months before the EXXON HOUSTON called at the SPM in March, 1989, Andrew Marshall visited the SPM at the request of Thomas Cornwall, then a vice president of Hawaiian Independent Refinery, Inc., PRI International, Inc. and PRI Marine, Inc.

Since 1978, Andrew Marshall has been a Senior Engineer employed by the Arabian American Oil Company (ARAMCO) in Dhahran, Saudi Arabia. His resume is attached as Exhibit "D". He is, unquestionably, an expert in SPM operations and maintenance. It is equally clear that Thomas Cornwall regarded him as such when he asked that Mr. Marshall review HIRI's SPM operation and maintenance procedures.

Mr. Marshall visited the HIRI SPM, and also visited Michael Turina, HIRI's engineer, at the HIRI refinery at Barbers Point. He inspected the SPM, and reviewed the maintenance procedures employed by HIRI's offshore maintenance contractor, Uaukewai Fishing & Diving. On September 22, 1988, following his visit to the SPM and at

Mr. Cornwall's request, Mr. Marshall met with representatives of PRI Marine, Inc. and HIRI, including Mr. Turina.

At the meeting, Mr. Marshall discussed his observations and recommendations. He said that a breakaway was inevitable (he apparently was not told that two had already occurred). He also said that the SPM pipe arms were so poorly supported that eventually a mooring failure would result in the cargo hoses tearing off the SPM (Exhibit "E", p. 85; Exhibit "F" is the picture Mr. Marshall refers to in his testimony). He said Gall Thomson breakaway couplings were *essential* (Exhibit "E", p. 124).

In his deposition, Mr. Marshall said that he did not know whether, if HIRI had installed them, Gall Thomsons would have activated before the hose pulled free of the SPM, because of the defective SPM pipe arm (Exhibit "E", pp. 203-204).

Gall Thomson breakaway couplings are designed to be installed between sections of a hose string, fairly close to the ship's end of the hose string. They can be set to activate at a any of a wide range of tensions and, when activated, separate the hose string, closing each side of the hose string quickly enough to minimize the amount of oil spilled (Exhibit "G"). HIRI has recently purchased Gall Thomsons. Our experts have told us that the HIRI Gall Thomsons will probably be set to activate at between 28 tons and 35 tons.

If there is another component of a system under tension which is weaker than the Gall Thomsons, that other component will fail before the Gall Thomsons activate. Because the un-reinforced

\* \* \*

[p. 85] Q That is shown in the photographs?

A It's shown in the photograph from the ship. The photograph through the bullnose shows the SPM, and on the left-hand side of the turntable of what I would call the overboard pipe arms, which come down and connect to the loading hoses, and I was particularly concerned about that design.

I wanted to know if there was any other load bearing structure around that pipe work as it passed through the deck. In other words, the overboard pipe arms are not supported in any other place in that top weld. And I considered that to be a poor design. Because when you have a breakout, which is inevitable, I told them you will tear off those pipe arms if the hoses are connected to the SPM.

Q So you didn't believe they were adequately supported?

A No. Or adequately fended.

The reason I made that statement was because ARAMCO had similar problems and we had redesigned our overboard pipe arms to withstand a hundred ton axial load.

Now, a hundred tons is way more than we'll ever - excuse me - a hundred tons is far

\* \* \*

[p. 124] I considered to be the best double carcass hose manufacturer on the blackboard, and that is Dunlop.

Q Your former employer?

A By coincidence my former employer, who invented the double carcass hose. And back in 1988, '89, I don't believe there were any competitors on the market. There are now.

I also wrote down the name of Gall-Thomson.

Q For the breakaway couplings?

A For the breakaway coupling. I told them that we used Gall-Thomson breakaway couplings and I told them that in my opinion, it was an absolute essential. Essentially, is the position I put them in is the reducer position. So you substitute the reducer between the rail hose and the main line floating hoses with a breakaway coupling. Then, in the event of a breakout, not only have you saved your hoses, but you only have maybe four hoses connected to your manifold and there's no way of them interfering with the operation of the vessel.

I pointed out to them that in the event of the breakout, that they were going to have, because I told them they were going to have [p. 125] one, no question in my mind, that in my opinion, the overboard pipe arms, which I discussed earlier, would be ripped off the buoy because they're not supported at the bottom. And I also expressed my reservations about that design with respect to corrosion underside of the turntable at that weld connection point where the piping goes through the deck.

I also told them that it's very bad practice to burn the studs out of stud link chain.

Q Right. You mentioned that you addressed the subject of Chafe Chain at this meeting. Was that one of the subjects on that?

A Right. Never apply heat to a chain of any type.

My point about the chain was, you've got the big rope and then you've got the chain and then you're attaching the chain to the snorter, and then using that to moor the ship. Is that normal practice? And they said yes, fairly normal practice.

I suggested to them that they look into requesting vessels have equipment suitable to accommodate the chain rather than a snorter. Because in my opinion, you're downgrading the

\* \* \*

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Attorney for Third-Party Defendant  
GRIFFIN WOODHOUSE, LTD.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY )	CIVIL NO.
and EXXON COMPANY, U.S.A. )	90-00271 HMF
(A Division of Exxon )	
Corporation), )	THIRD-PARTY
Plaintiffs, )	DEFENDANT
vs. )	GRIFFIN
PACIFIC RESOURCES, INC., )	WOODHOUSE,
HAWAIIAN INDEPENDENT )	LTD.'S RULE 16
REFINERY, INC., PRI MARINE, )	POSITION
INC., PRI INTERNATIONAL, )	STATEMENT
INC., AND SOFEC, INC., )	
Defendants, )	
and )	
PACIFIC RESOURCES, INC., )	
HAWAIIAN INDEPENDENT )	
REFINERY, INC., PRI MARINE, )	
INC., AND PRI )	
INTERNATIONAL, INC., )	
Third-Party )	
Plaintiffs, )	



vs. )  
 )  
 BRIDON FIBRES AND )  
 )  
 PLASTICS, LTD., GRIFFIN )  
 )  
 WOODHOUSE, LTD., and )  
 )  
 WERTH ENGINEERING, INC., )  
 )  
 Third-Party )  
 Defendants. )

THIRD-PARTY DEFENDANT GRIFFIN WOODHOUSE,  
LTD.'S RULE 16 POSITION STATEMENT

Third-Party Defendant GRIFFIN WOODHOUSE, LTD., by its counsel, respectfully submits that evidence concerning breakaway couplings which plaintiff now attempts to include in Phase One of the trial is precluded by the Court's Order Granting Motion to Bifurcate entered on July 31, 1992. GRIFFIN WOODHOUSE, LTD. further urges the Court to exclude such evidence on the grounds that it will reopen costly and new discovery amongst the parties and that the issue of breakaway couplings can be addressed, if necessary, in Phase Two of the trial. As currently structured, Phase One of the trial will focus on the navigation of the Exxon Houston by its officers under the circumstances presenting themselves at the time of the breakaway of the last hose at 1728. Thus, the benefit or lack thereof of a breakaway coupling would have occurred prior to or at 1728. The lack of a breakaway coupling is a Phase 2 issue and is clearly separate from the navigational issues.

IN THE UNITED STATES DISTRICT COURT FOR THE  
 DISTRICT OF HAWAII

EXXON SHIPPING COMPANY )  
 and EXXON COMPANY, U.S.A. )  
 (a Division of Exxon )  
 Corporation), )  
 Plaintiffs, )

vs. )

PACIFIC RESOURCES, INC., )  
 HAWAIIAN INDEPENDENT )  
 REFINERY, INC., PRI MARINE, )  
 INC., PRI INTERNATIONAL, )  
 INC., and SOFEC, INC., )  
 Defendants. )

CIVIL NO.  
 90-00271HMF

PACIFIC RESOURCES, INC.; )  
 HAWAIIAN INDEPENDENT )  
 REFINERY, INC.; PRI MARINE, )  
 INC.; and PRI )  
 INTERNATIONAL, INC., )  
 Third-Party )  
 Plaintiffs, )

vs. )

BRIDON FIBRES AND )  
 PLASTICS, LTD., GRIFFIN )  
 WOODHOUSE, LTD., and )  
 WERTH ENGINEERING, INC., )  
 Third-Party )  
 Defendants. )

## TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on [p. ii] Tuesday, December 8, 1992 at 9:10 a.m., at Honolulu, Hawaii,

## BEFORE:

HONORABLE HAROLD M. FONG  
United States District Judge  
District of Hawaii

## APPEARANCES:

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Bridon Fibres and Plastics, Ltd.;

JOHN R. LACY, Esq.  
Goodsill, Anderson, Quinn

TERRENCE CHUN, RPR - CSR #114  
OFFICIAL COURT REPORTER - U. S. DISTRICT COURT

\* \* \*

[p. 3] and it broke loose at that point where just a short stump remained on the vessel then they would have been permitted to go forward.

Ms. Givens, tell me: Is there anything - have I stated it wrong somewhere or differently?

MS. GIVENS: Our point is a little bit different, Your Honor.

THE COURT: Oh, all right. Then why don't you tell me what it is.

MS. GIVENS: Our point is that Gall Thompson couplings, had they been present, could have been activated after the second cargo hose broke and had they been activated at that point, it would have eliminated the hazards to navigation, the grounding never would have occurred. We, therefore, think that it is similar to the issues of the competency of the mooring master and the adequacy of the tug in that all three factors, had they

been – those which would have been provided with a safe berth would have eliminated or at least reduced the hazards to navigation and it is, therefore, appropriate to consider it in the first phase of trial; that distinguishes from other aspects of a safe berth. For instance, the berth was unsafe because it had a defective chafe chain. However, even if there had been a safe chafe – safe chafe chain after 1728, it wouldn't have helped the EXXON HOUSTON at all. Once she had broken free, once she had a set [p. 4] of circumstances that she faced at 1728, a good chafe chain or a safe SPM wouldn't have helped her at all. Gall Thompsons could have helped after 1728 and we, therefore, think it's a Phase 1 issue.

THE COURT: How – how does a breakaway coupling – how would it have worked by your theory of the case?

MS. GIVENS: All right. The breakaway couplings are automatically activated when a certain tension is reached. There's no magic to the way in which the tension is reached. It can be reached when a ship breaks off a mooring and a certain tension pulls on the cargo hose. On the other hand, it can just as well be reached when a tug pulls on the loose end of the cargo hose. As long as that tension is reached, they will automatically activate. When they activate, they're set into the hose string very close to the ship end of the hose string. When they activate, they sever the two ends, the two sides of the hose string, and so what you are left with is a relatively short line of hose still attached to the manifold of the ship which does not present any hazard to navigation, and we're saying that a tug could have done the job.

THE COURT: Well, but before a tug does the job, are you saying that it was also part of its function that even when moored and with the chain – safe or unsafe chafe chain – if it had been on, then it would have activated at that point – it could have activated at that point?

\* \* \*

[p. 8] were both in very calm weather and they were able to keep the ships head near the SPM while they disconnected the hoses or brought another mooring assembly on board.

They knew they had a problem. They didn't solve it. Gall Thompsons were recommended to them because they were such an obvious and great solution to this particular berth's problems. So, yes, in this particular case as to this particular berth I would say that the failure to install Gall Thompsons did constitute a breach of the warranty of safe berth and that had they been installed the berth would have been considerably safer.

THE COURT: But, a safe berth, is that part of Phase 1 or Phase 2 of the trial?

MS. GIVENS: Well, Your Honor, as I understand it, we will be permitted to introduce evidence of breaches of the warranty of safe berth to the extent that they entail aspects of the berth which had they been safe would have reduced or eliminated the hazards faced by Captain Dick after 1728. We will be precluded from introducing any evidence of aspects of the berth which had they been safe might have prevented the chain failure or the cargo hose from ripping off. But, as to things which



could have made Captain Dick's circumstances either better or completely good, we will be allowed to introduce those in Phase 1.

THE COURT: All right. Let me hear from HIRI or

\* \* \*

[p. 22] is making is: They're saying – and that is true what Mr. Marshal said. Mr. Marshal said there were quite a few problems with this SPM. One problem was they had had two previous location – locations where the chain or parts of the chain or fittings broke, but the sea was calm and no damage happened. The master was able to keep the ship close enough to the buoy so that the hose didn't even break. So, Mr. Marshal said that he was called by HIRI to review the berth and advised – he said: Look at the Waikiki over there. You don't want to spill there and you will have one because you had already two breakouts. You will have another. So, put in breakaway couplings in here and they cost only 200,000 per shot, and you have a little pin – a tiny pin in there which Mr. Playdon said can be calibrated to break at the exact load – Usually 25 tons for something like HIRI's operation – but, Mr. Marshal also said: Listen, your risers on the manifold are designed – seems to me just too weak. You know, in a case of a breakout, they might be weaker than the hose and six months later when the hose herein broke, he was proven right because one hose, as the fortune will tell you, broke above here – Mr. Turino, said that's where they should have had the breakaway coupling, but the other hose tore out parts of the manifold, so Captain Dick was stuck with

the entire length of the hose, plus bits and pieces of the manifold.

Now, the case that Exxon is making is they're [p. 23] saying: Let's assume there was a breakaway coupling right in here on the long hose. In other words, the second hose which tore off at the manifold, taking part of the manifold with it.

And Exxon says, and Mr. Marshal agrees, that that is possible because this was obviously very weak and it would be that it would have broken under a load lesser than that which it would have been necessary to activate the breakaway coupling. Then Exxon says: If HIRI had – and this is the major part of that assumption – if HIRI also had a 4000 horsepower tug out there, as opposed to their line boat, then that tug could have motored up to the hose and put a line on the hose and simply pulled the hose away from the vessel and activated the breakaway coupling and the EXXON HOUSTON would have been freed of the hose. The flaw, Your Honor, in that whole argument is not that it is not possible. It's indeed possible. The 4000 horsepower tug would have done it had they had one there. They had only a little line boat called NANA (Phonetic), which couldn't possibly have done it, but the 4000 horsepower tug could have – could have easily done it. Easily.

The flaw in the argument, as I understand, is if they had had the 4000 horsepower tug – and that's a tug necessary to pull the hose enough to activate the coupling – that tug wouldn't have had to do it and, as Mr. Marshal says in his affidavit that I'll be giving you momentarily, that

\* \* \*

[p. 34] Phase 2 and somebody insists on going ahead and you try to block that, then it would be fair for that point of determining: Well, I might also agree with you it should be out of Phase 2, and maybe I should have considered it in Phase 1, then it would be unfair to the issue having been tried or addressed. But, if that can be addressed in Phase 2 of it, the Court is more persuaded that that may be where it belongs.

So, Ms. Givens, you have the last opportunity to convince me this is part of Phase 1. Why is it part of Phase 1?

MS. GIVENS: It is part of Phase 1 because we have been given the opportunity, in your order of October 9th, to put on evidence of breaches of the warranty of safe berth to the extent that they – that a safe berth would have eliminated or reduced the hazards faced by the captain after 1728. It would be extremely prejudicial to us if you were to determine cause as to the grounding after 1728 without considering whether or not HIRI breached its warranty of safe berth by failing to provide an adequate tug and Gall Thompson couplings. It's just fundamental fairness that we should be given the opportunity to present this in Phase 1. It is clearly something which would have affected events after 1728 in such a way that the grounding would not have occurred. It was probably one of the most effective things HIRI could have done to make that berth safe in the event of a breakout and [p. 35] the failure of the SPM manifold. The additional discovery entailed in putting on this evidence is nowhere near as extensive as the defendants have made out. Most of the

persons with information about the Gall Thompson couplings have already been deposed and they've already been asked about Gall Thompsons.

Andrew Marshal is one of two experts that Bridon would offer on the issue. He has been partially deposed and has talked at length about Gall Thompsons. We might have – we would have our expert offer a supplemental opinion and we would make him available for deposition immediately before trial and Andrew Marshal and the Gall Thompson representative could also be deposed immediately before trial. I do not believe that the spector of extensive and expensive additional discovery, No. 1, is valid – is accurate and, No. 2, is any reason to preclude us from offering all reasonable evidence of manners in which the berth could have been made safe in the event of a breakout at the berth.

THE COURT: All right. Any final word before the Court rules?

(No response)

THE COURT: Well, the Court is now introduced to the breakaway coupling. From the standpoint of view that this is part of a safe berth, from the standpoint of view that it may have affected the presence of the hose across the bow to [p. 36] possibly give an extra option of movement to the captain, when this Court bifurcated this case it defined Phase 1 as that portion of the trial where the captain finds himself in the situation with the hose across the front of the bow and dragging the line, with his maneuver backing up because he said that was the only thing to do – or the only thing he could do, and if this Court were to add the breakaway coupling, it would

change the parameters of that trial, but the Court is concerned about the speculative nature, which on one hand HIRI says that this is really a design decision that they made. They designed it such that they were not going to utilize that in their system; that clearly design would clearly be a Phase 2 portion so that the Court can see that this is a logical phase in Phase 2 where the issue of not having designed a breakaway coupling would be a natural consequence or a natural part of the decision of a safe berth.

I'm also concerned about speculation that when Mr. Krek now tells me that it could possibly have broken off at the manifold - at the SPM at a different tonnage pull than what it would have been to break it away naturally or automatically at the breakaway coupling point.

I'm also concerned about the second phase or second point about the availability of an adequately tonnaged tug, who - or which might have done the work that Ms. Givens talked about, that it must have broken off the line, but, as

\* \* \*

# CASE & LYNCH

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Third-Party Defendant  
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## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

EXXON SHIPPING	) CIVIL NO.
COMPANY and EXXON	) 90-00271 HMF
COMPANY, U.S.A. (A	) IN ADMIRALTY
Division of Exxon	)
Corporation),	) PRETRIAL
Plaintiffs,	) CONFERENCE ORDER
vs.	)
PACIFIC RESOURCES, INC.,	) (Filed Dec. 14, 1992)
HAWAIIAN INDEPENDENT	)
REFINERY, INC., PRI	) Date: December 8, 1992
MARINE, INC., PRI	) Time: 9:00 a.m.
INTERNATIONAL, INC.,	) Judge: Judge Harold
and SOFEC, INC.	) M. Fong
Defendants,	)
PACIFIC RESOURCES, INC.;	)
HAWAIIAN INDEPENDENT	)
REFINERY, INC.; PRI	)
MARINE, INC.; and PRI	)
INTERNATIONAL, INC.,	)
Third-Party	)
Plaintiffs,	)



vs. )  
 BRIDON FIBRES AND )  
 PLASTICS, LTD., GRIFFIN )  
 WOODHOUSE, LTD., and )  
 WERTH ENGINEERING, INC., )  
 Third-Party )  
 Defendants. )  
 \_\_\_\_\_ )

### PRETRIAL CONFERENCE ORDER

A pretrial conference was held on Tuesday, December 8, 1992 before the Hon. Harold M. Fong, United States District Judge. Appearing at the conference were Leonard F. Alcantara, Esq. and Judy S. Givens, Esq., for Plaintiffs, George W. Playdon, Esq. and Patricia K. Wall, Esq. for Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc. (collectively "HIRI"), Nenad Krek, Esq. for Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd., and John R. Lacy, Esq. for Defendant and Third-Party Defendant Griffin Woodhouse, Ltd.

Pursuant to Federal Rules of Civil Procedure, Rule 16(e), the Court enters this pretrial conference order:

1. Evidence concerning Gall Thomson marine breakaway couplings shall not be admitted in Phase One of the trial. Such evidence may be introduced in Phase Two of the trial.

2. This order shall remain in effect until modified by the Court.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, DEC 14 1992.

HAROLD M. FONG  
 UNITED STATES  
 DISTRICT JUDGE

APPROVED AS TO FORM:

/s/ Judy Givens  
 LEONARD F. ALCANTARA  
 JUDY GIVENS  
 Attorneys for Plaintiffs  
 EXXON SHIPPING COMPANY, INC. and  
 EXXON COMPANY, U.S.A

/s/ George Playdon  
 GEORGE PLAYDON  
 PATRICIA K. WALL  
 Attorneys for Defendants  
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 HAWAIIAN INDEPENDENT REFINERY, INC.,  
 PRI MARINE, INC., and  
 PRI INTERNATIONAL, INC.

/s/ John R. Lacy  
 JOHN R. LACY  
 Attorneys for Defendant and  
 Third-Party Defendant  
 GRIFFIN WOODHOUSE, LTD.

EXXON SHIPPING COMPANY )	CIV. NO.
and EXXON COMPANY, U.S.A. )	90-00271 HMF
(A division of Exxon )	
corporation), )	
Plaintiff, )	
vs. )	
PACIFIC RESOURCES, INC.; )	
HAWAIIAN INDEPENDENT )	
REFINERY, INC.; PRI MARINE, )	
INC.; PRI INTERNATIONAL, )	
INC.; and SOFEC, INC., )	
Defendants. )	
<hr/>	
PACIFIC RESOURCES, INC.; )	
HAWAIIAN INDEPENDENT )	
REFINERY, INC.; PRI MARINE, )	
INC.; PRI INTERNATIONAL, )	
INC., )	
Third-Party Plaintiffs, )	
vs. )	
BRIDON FIBRES AND )	[FINDINGS OF
PLASTICS, LTD.; GRIFFIN )	FACT AND
WOODHOUSE, LTD., and )	CONCLUSIONS
WERTH ENGINEERING, INC., )	OF LAW]
Third-Party Defendants. )	(Filed
	May 20, 1993)

On March 2, 1989, the oil tanker EXXON HOUSTON stranded near Barbers Point on the island of Oahu after breaking away from its mooring earlier that day. Between February 9, 1993 and March 3, 1993, the court held a bench trial in this admiralty action relating to the stranding. The trial was the first phase ("Phase One") of a bifurcated proceeding, and was limited to events occurring after the EXXON HOUSTON broke away from its mooring.

The court makes the following findings of fact and conclusions of law. To the extent that any findings of fact herein are more properly construed as conclusions of law, they shall be so construed; and to the extent any conclusions of law are more properly construed as findings of fact, they shall be so construed.

## FINDINGS OF FACT

### A. Parties

1. Plaintiff Exxon Shipping Company was the owner and operator of the EXXON HOUSTON, an oil tanker. Exxon Shipping Company vessels carry petroleum products for Plaintiff Exxon Company, U.S.A. This order will refer to the Plaintiffs collectively as Exxon.

2. Defendants and Third-party Plaintiffs Pacific Resources, Inc., PRI International, Inc., and Hawaiian Independent Refinery, Inc. are affiliated corporations. These corporations trade in oil and operate the single point mooring and refinery at Barbers Point.

3. Defendant Sofec, Inc. manufactured the single point mooring at Barbers Point.

4. Third-party Defendant Griffin Woodhouse, Ltd. manufactured the chafe chain which held ships to the single point mooring.

5. Third-party Defendant Bridon Fibres and Plastics, Ltd. distributed the chafe chain.

6. Third-party Defendant Werth Engineering, Inc. was dismissed from this action before the trial. This order will refer to the Defendants and Third-party Defendants collectively as the Defendants.

#### B. Contractual Arrangements

7. Plaintiff Exxon Company, U.S.A., a division of Exxon Corporation, and Defendant PRI International, Inc., ("PRII") entered into a buy/sell arrangement in 1988, pursuant to which Exxon Company, U.S.A. delivered Alaska North Slope crude oil to PRII and PRII delivered West Texas Intermediate crude oil to Exxon Company U.S.A.

8. Among the terms of the agreement was a paragraph entitled "Safe Berth Availability" which provided, in relevant part:

The terminal shall provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat. However, notwithstanding anything contained in this clause, the terminal shall not be deemed to warrant the safety of public channels, fairways, approaches thereto, anchorages, or other

publicly-maintained areas either inside or outside the port area where the vessel may be directed.

9. On April 4, 1988, at PRII's request, Exxon U.S.A. agreed that the above quoted provision "includes 'single point mooring' ". The provision, as amended, was in effect on March 2, 1989.

10. On June 7, 1988, Exxon U.S.A. agreed to deliver crude oil "by vessel into Hawaiian Independent Refinery, Ewa Beach, Hawaii via offshore single point system, or upon request by PRI vessel into a West Coast refinery or terminal acceptable to Exxon."

11. On March 1, 1989, pursuant to the above contract, the EXXON HOUSTON arrived at the single point mooring (SPM) at Barbers Point, Oahu. The SPM is owned and operated by Defendant Hawaiian Independent Refinery, Inc. (HIRI), an affiliate of PRII.

#### C. Arrival Of The EXXON HOUSTON At HIRI's SPM

12. At all times relevant to Phase One trial, the EXXON HOUSTON was a single screw, steam propulsion oil tanker, 72,056 dead weight tons and 766.9 feet in length, with shaft horsepower of 19,000 ahead, and approximately 6,000 astern.

13. At all times relevant to Phase One trial, the EXXON HOUSTON was equipped with two forward anchors, mounted on the port and starboard bows respectively, and another anchor astern. The forward anchors carried with them 1,080 feet of anchor chain.



14. At all times relevant to Phase One trial, Kevin Dick was the Master of the EXXON HOUSTON. Kevin Dick has changed his name to Kevin Coyne, and these findings of fact will refer to him as Captain Coyne. Captain Coyne was an employee of Exxon Shipping Company and was acting within the course and scope of his duties throughout the events leading up to the stranding.

15. Previous visits in Exxon tankers had familiarized Captain Coyne with HIRI's single point mooring at Barbers Point. At these earlier visits, HIRI mooring masters had briefed Captain Coyne on the conditions at the SPM. This briefing included information about the unpredictability of currents at the SPM.

16. On March 1, 1989, the EXXON HOUSTON arrived at HIRI's SPM. Captain Stephen Kuntz, a mooring master provided by HIRI, boarded the EXXON HOUSTON and oversaw the mooring of the vessel to the SPM.

17. Before allowing the vessel to moor at the SPM, Captain Kuntz presented to Captain Coyne a document entitled General Instructions, Discharging/Loading Orders and Indemnification, dated March 1, 1989, which Captain Coyne signed.

18. On March 2, 1989, the EXXON HOUSTON was manned by the following officers (other than Captain Coyne) who were employed by Exxon Shipping Company:

<u>Name</u>	<u>Position</u>
Duane Madinger	Chief Mate
Hallock Davis	Second Mate
Raymond Spiller	Third Mate
Richard Spear	Third Mate

All were acting within the course and scope of their duties that day.

19. Third Mate Spear had been relieved by Third Mate Spiller on March 1, 1989, but remained on board through March 2, 1989 as an extra man per Captain Coyne's instructions.

20. On March 2, 1989, Marie Huhnke, a licensed third mate, was employed by Exxon Shipping Company on board the EXXON HOUSTON as an able-bodied seaman (AB).

21. On March 2, 1989, Captain Steven Marvin relieved Captain Kuntz as mooring master and was on board the EXXON HOUSTON at all times relevant to Phase One trial.

22. Captain Marvin was a competent and experienced mooring master by virtue of his naval background, his training as a mooring master, and his 8 years of experience as a HIRI mooring master. Captain Marvin did not have a master's license nor experience aboard commercial tankers as master or first mate. These were HIRI requirements for mooring masters which were instituted after Captain Marvin had begun serving as a mooring master. The court finds Captain Marvin's failure to meet

these requirements to be irrelevant in light of his experience and training and not a cause of the incident on March 2, 1989.

23. On March 2, 1989, the EXXON HOUSTON was moored to HIRI's SPM and discharging oil into HIRI's submerged pipeline. The discharge required two floating hoses, each approximately 840 feet in length, which ran from the port manifold of the EXXON HOUSTON to the SPM. Each hose was secured to the ship's manifold by twelve bolts and several restraining lines.

24. A mooring assembly including a chafe chain and mooring hawser attached the bow of the EXXON HOUSTON to the SPM. During normal operations at the SPM, the mooring assembly held the ship in place and allowed the hoses to float freely without any tension.

#### D. The Breakout

25. On March 2, 1989, while the EXXON HOUSTON was discharging oil at the SPM, there was a heavy storm with winds and seas coming generally from the south (a Kona storm). At 1715,<sup>1</sup> the storm caused a link in the chafe chain to part. The ship began to drift away from the SPM, putting the hoses under tension.

26. Despite an attempt to keep the ship near the SPM, the hoses parted. The first hose parted close to the water line of the vessel beneath the port manifold of the

<sup>1</sup> In conformance with the trial testimony, all times in these findings are given in Honolulu local time in military format. Thus, 5:15 p.m. Honolulu time is written as 1715.

EXXON HOUSTON at 1725. Because only a short portion of this hose was left attached to the ship, it was not a threat to the ship's subsequent handling.

27. The second hose parted at approximately 1728 on March 2, 1989. This is the point which has been designated as the "breakout" and is the initiating point in time for the Phase One trial.

28. The second hose tore a heavy metal spool piece off the SPM, leaving approximately 840 feet of that hose connected to the ship's port manifold. Approximately 100 feet at the end of the hose sank due to the weight of the spool piece. The remainder of the hose continued to float. (Any further references to "the hose" refer to this second, longer hose.)

29. The hose was long enough to reach the ship's propeller from the port manifold. Captain Coyne was justifiably concerned that the hose would foul the propeller if the ship went forward.

30. A small line handling boat, the NENE, was at the SPM to assist the EXXON HOUSTON when the breakout occurred. The NENE was too small to push or tow the EXXON HOUSTON to safety after the breakout.

31. At 1728, the EXXON HOUSTON's draft was 15 feet forward and 30 feet aft. This left an unusually large portion of the EXXON HOUSTON's bow above the water, making the vessel more difficult to turn in the wind.

32. During the period between 1728 and 2009, the bridge of the EXXON HOUSTON was manned by an able-bodied seaman acting as the helmsman, and the

following vessel's officers and the mooring master as shown below:

- A. From 1728 until 1830:  
Captain Coyne  
Captain Marvin  
Second Mate Davis
- B. From 1830 until 1948:  
Captain Coyne  
Second Mate Davis
- C. From 1948 until 2000:  
Captain Coyne
- D. From 2000 until 2009:  
Captain Coyne  
Third Mate Spiller

33. Two vessels had broken away from HIRI's SPM on previous occasions. In one case the vessel was successfully remoored to the SPM, while in the other case the vessel's master kept the vessel's head to the SPM while the oil hoses were disconnected.

34. At 1730, the U.S. Coast Guard Joint Rescue Coordination Center initiated a radio call to the EXXON HOUSTON asking if assistance was needed. The Coast Guard told Captain Coyne that assistance vessels would take more than two hours to arrive. Captain Coyne refused the offer of assistance, believing that the situation would be resolved within that time.

E. Attempt To Anchor

35. At approximately 1740, Captain Coyne dropped his forward starboard anchor which paid out one shot (15

fathoms/90 feet) of chain. The depth of water in the area where the anchor was dropped is 10-11 fathoms (60-66 feet).

36. The standard practice in anchoring a ship is to release several additional shots of chain which increase the anchor's holding power. When the anchor stops pulling chain out by itself, the ship deploys the extra chain by either going slightly astern or by pushing chain out with the anchor windlass.

37. One shot of chain could not hold the ship in 10-11 fathoms of water. Five to six shots of chain would have been required to hold the EXXON HOUSTON at its 1740 anchoring position. On the evening of March 2, 1989, the EXXON HOUSTON had on board and available 12 shots (1080 feet) of anchor chain for each of the forward anchors.

38. Captain Coyne neither went astern nor engaged the windlass to deploy the chain. Captain Coyne abandoned the anchoring attempt at 1747 after the chain did not pay out of its own accord.

39. While raising the starboard anchor, the long hose became lodged on the anchor. Captain Coyne then ordered the anchor re-lowered to dislodge the hose from the starboard anchor.

40. Although in retrospect this might have provided an opportunity to keep the hose secured away from the propeller, there was a real possibility that the hose would later free itself and again endanger propulsion. Moreover, the situation presented to Captain Coyne was a novel one, and it was not negligent that Captain Coyne did not



think of exploiting the happenstance snagging of the hose.

41. After Captain Coyne raised the starboard anchor at approximately 1747, he never again attempted to anchor the EXXON HOUSTON prior to the stranding.

42. A review of the track taken by the EXXON HOUSTON between 1747 and 2009 shows numerous areas where the vessel could have safely anchored.

#### F. The Transit

43. By 1803, the NENE had attached a line to the hose and was able to control the end of the hose, keeping it on the EXXON HOUSTON's port side and away from the EXXON HOUSTON's propeller. Captain Coyne ordered the NENE's movements as necessary to coordinate with the EXXON HOUSTON's movements.

44. The EXXON HOUSTON backed out to sea between 1803 and 1830. Its position was plotted on chart # 19362 for times 1740, 1747, 1803, 1820 and 1830. From 1803 to 1830, the EXXON HOUSTON made a course of 260°, proceeding in a generally westerly direction at a speed of 2 knots over ground, on a half astern bell. This course took the EXXON HOUSTON out to sea and away from shallow water.

45. Captain Marvin testified that at 1830, positions for times 1803, 1820, and 1830 were not plotted on the chart. The implication of this testimony is that the three fixes were falsified. Captain Marvin further testified that he had accurately estimated the ship's position at 1830 to

be 800 yards due west of the SPM, a position that conflicts with the plotted 1830 position. The court finds these portions of Captain Marvin's testimony to be not credible in light of the weight of the evidence. The court finds that the 1803, 1820, and 1830 fixes accurately reflect the positions of the EXXON HOUSTON at those times.

#### G. Post-1830 Maneuvers

46. At 1831, Captain Coyne quit transmitting away from the shore and ordered a slow ahead bell. The change of course at 1831 was not caused by any necessity or emergency and there was no reason why the vessel could not have continued to back out to sea after 1830. At 1830, the EXXON HOUSTON was only slightly more than one mile away from the shore, and about a half mile from the grounding line.

47. The EXXON HOUSTON remained from 0.9 to 1.1 miles from shore from 1830 until 1956. Had Captain Coyne so decided he could have continued to back the ship after 1830 to any distance offshore he wanted. Later in the evening, Captain Coyne could have suspended disconnecting the hose at any time and backed another mile to deeper water. Backing further to sea could have been accomplished without significant risk to the EXXON HOUSTON or the NENE, and in fact posed much less risk than remaining near the shore while a Kona storm tended to push the ship ashore.

48. At 1831, Captain Coyne began backing and filling-alternating short ahead and astern bells to maintain a sheltered lee on the port side of the vessel. The lee

allowed the hose to be disconnected with reduced exposure to the wind and seas from the south. The backing and filling caused the ship to stop its progress away from the shore.

#### H. Navigation After 1830

49. Between 1830 and 2004 on the evening of March 2, 1989, a period of one hour and thirty four minutes, no positions of the EXXON HOUSTON were plotted on any chart.

50. At some time between 1830 and 2004, the EXXON HOUSTON moved out of the area charted on chart # 19362. At that point, chart # 19357 should have been used. Chart # 19357 was less detailed than chart # 19362, but was adequate for plotting fixes. Fixes could have been plotted on Chart # 19357 without obliterating either prior fixes or the information on the chart.

51. There are adequate charted aids to navigation in the vicinity of Barbers Point.

52. A prudent mariner would have fixed and plotted his vessel's position at least every 15 to 20 minutes in the situation in which the EXXON HOUSTON found itself after 1830 on March 2, 1989. Many factors existed that day that would have compelled a prudent mariner to fix his position frequently. These factors include, but are not necessarily limited to: the proximity to shore, the rough weather pushing the ship shoreward, the difficulty of estimating the ship's position in the dark, the possibility that removing the hose would be a distraction from

navigation, and the difficulty of maneuvering the EXXON HOUSTON with the hose attached.

53. Frequent plotting of the vessel's position would have enabled Captain Coyne to determine the effects of wind, sea and any currents on the tanker, and would have alerted him that he was approaching danger.

54. Captain Coyne had personnel available for the plotting of fixes but failed to use them. As a requirement of receiving a third mate's license, an individual must pass a Coast Guard examination and demonstrate an ability to take and plot fixes. Each of the officers and AB Huhnke were able to take and plot fixes.

55. Captain Coyne testified that between 1830 and 1956, he navigated by the method of parallel indexing, a technique in which a line is drawn on the radar to show relative movement with respect to an object. Using parallel indexing, Captain Coyne endeavored to keep the EXXON HOUSTON at a distance of 0.9 to 1.1 miles from the shore.

56. Parallel indexing is not a substitute for fixing the position of the vessel. Navigation by parallel indexing without plotted fixes is inherently dangerous and a violation of industry standards.

57. With respect to the technique of parallel indexing, the Exxon Navigation and Bridge Organization Manual specifically states as follows:

Parallel indexing does not relieve the ship's officer of the duty to frequently plot the position of the ship on the chart by means of navigational fixes.



\* \* \*

FAILURE TO FOLLOW THE ABOVE PRECAUTIONS OR TO PROCEED WITHOUT RELIABLE CHARTED FIXES IS DANGEROUS. PARALLEL INDEXING IS A SUPPLEMENTAL NAVIGATIONAL TECHNIQUE ONLY.

Joint Trial Exhibit 250, Appendix G, p. 5 (capitalization in original).

58. Captain Coyne testified at trial that he often ascertained the position of the ship after 1830 even though he failed to plot it on the chart. For the reasons explained below, the court finds this testimony to be not credible.

59. Captain Coyne's trial testimony contradicts his own earlier deposition testimony. Captain Coyne testified at trial that he took bearings to Barbers Point lighthouse after 1830. These bearings and the parallel indexing range taken from the radar supposedly allowed him to ascertain the ship's position. At his deposition on April 3, 1991, however, Captain Coyne testified that he did not remember taking bearings and that he relied on parallel indexing. When asked to explain this discrepancy at the trial, Captain Coyne did not have a plausible explanation.

60. Captain Coyne also testified at trial that he and Second Officer Davis frequently cross-checked their parallel indexing and that both understood the ship's navigational situation. This situation, as described by Captain Coyne and confirmed by the ship's ultimate stranding position, was that the EXXON HOUSTON rounded Barbers Point and moved northward along Oahu's west shore. In order to monitor this progress, Captain Coyne

would have needed to use chart # 19357. In contrast, Second Officer Davis testified in his deposition that he believed the ship had remained near its 1830 position in the area charted on chart # 19362. He further testified that chart # 19357 was not used while he was on the bridge. Second Officer Davis' account shows that he did not know the true position of the ship, and casts further doubt on Captain Coyne's assertion that Second Officer Davis and Captain Coyne cross-checked their positions.

61. The conflicting testimony is not the only evidence that Captain Coyne did not know the position of the EXXON HOUSTON after 1830. As discussed in more detail below, at 1956 Captain Coyne ordered a right turn that took the EXXON HOUSTON directly onto a charted reef. The most plausible explanation for that turn is that Captain Coyne did not know the EXXON HOUSTON's position when he started that turn.

62. Thus, the court finds that Captain Coyne did not take bearings to ascertain the EXXON HOUSTON's position after 1830 on March 2, 1989. From 1830 to 2004, Captain Coyne knew only his range from shore from the parallel indexing plot. This single input did not allow him to fix the ship's position. Without a fix, Captain Coyne was not able to check the chart for hazards.

#### I. Hose Disconnect And Crane Failure

63. At 1830, Captain Marvin left the bridge of the EXXON HOUSTON to assist with disconnecting the hose. Captain Marvin did not return to the bridge again until after the grounding. Captain Coyne did not ask Captain Marvin to return to the bridge at any time after 1830.



64. It took over an hour to disconnect the hose. After the hose was disconnected, the EXXON HOUSTON's port crane was used to lower the hose into the water. While the hose was suspended from the crane, the NENE and the EXXON HOUSTON moved apart, causing the crane to collapse at 1944.

65. The crane's collapse freed the hose, allowing it to drop into the water. At 1947, the NENE pulled the hose clear of the EXXON HOUSTON.

66. As the crane collapsed, it carried the crane operator's seat onto the deck with it. Chief Mate Madinger feared that the crane operator, AB Ike Denton, had been injured. Denton was taken to his quarters.

67. At 1948, Captain Coyne sent Second Mate Davis from the bridge to evaluate AB Denton's condition. Second Mate Davis had received medical training from Exxon Shipping Company, and was the designated "first responder" for medical casualties.

68. Captain Coyne did not replace Second Mate Davis with another officer on the bridge. From approximately 1948 to 2000, Captain Coyne was the only officer on the bridge of the EXXON HOUSTON. That left the bridge inadequately manned, with no other officer to fix the vessel's position.

69. Between 1948 and the time of the stranding, there were additional ship's officers available for duty on the bridge.

70. Exxon Shipping Company's Navigation and Bridge Organization Manual ("Navigation Manual") required that under conditions similar to those present on

the March 2, 1989, at least two ship's officers be present on the bridge at all time.

71. If the bridge had been properly manned, the danger of stranding would have been avoided.

#### J. The Final Turn

72. After evaluating AB Denton, Second Mate Davis reported to Captain Coyne that AB Denton was possibly going into shock, but had no external injuries.

73. Because Captain Coyne had more medical training than Second Mate Davis, Captain Coyne decided that he should personally evaluate AB Denton's condition as soon as possible. In order to accomplish this, Captain Coyne decided to rapidly move the ship away from the coast so that he could allow another officer to relieve him on the bridge.

74. At 1956, Captain Coyne commenced the "final turn," a right turn on a half ahead bell, which he then reduced at 1958 to a slow ahead, and he proceeded to execute the attempted turn on slow ahead bell until 2005.

75. Captain Coyne did not look at the navigational chart before commencing the final turn.

76. At the time when he commenced the final starboard turn, Captain Coyne did not know the ship's position.

77. The prevailing directions of the wind and sea, the EXXON HOUSTON's trim condition, and the low engine speed tended to broaden the turn, carrying the

ship towards the shore. Given these factors, a prudent mariner would not have attempted the starboard turn.

78. The starboard turn was towards the coast line, towards shallower water and towards potential danger. The starboard turn was grossly negligent, regardless of whether or not it could have been made successfully.

79. Backing out to sea or turning to port were viable and safe alternatives to the starboard turn. These options would have taken the EXXON HOUSTON away from the coast rapidly, allowing Captain Coyne to leave the bridge and attend to AB Denton.

80. Captain Coyne's stated reasons for rejecting the alternatives to the final turn do not excuse his choice. Captain Coyne testified that he rejected the port turn because of fears of colliding with the NENE and that he rejected backing out to sea because it was too slow and ineffective. Any danger of colliding with the NENE during a port turn could have been easily avoided by radar and/or radio contact. Backing out to sea was also a proven and effective maneuvering option.

81. Third Mate Spiller arrived on the bridge at around 2000. Captain Coyne was in doubt as to the ship's position at that time, and ordered Third Mate Spiller to take a fix of the vessel's position. Third Mate Spiller plotted the fix on chart # 19357 for time 2004.

82. When Captain Coyne saw the 2004 fix on the navigational chart, he exclaimed, "Oh, shit!" He immediately ordered an increased speed of half ahead, followed by full ahead at 2005.5.

83. The EXXON HOUSTON stranded at 2009 approximately 0.5 miles off of Barbers Point at 21° 17.8' N, 158° 07.3' W.

84. The stranding occurred at a reef that was clearly charted on Chart # 19357.

85. Over two and one-half hours elapsed between the breakout and the stranding. During that period, Captain Coyne and his crew had ample time to consider the situation calmly and deliberately.

#### K. Current Information

86. Exxon has argued that the final turn failed only because of a large current that pushed the ship onto the reef. Exxon claims that the current was predictable, that HIRI should have warned Captain Coyne about the current, and that Captain Coyne would not have attempted the final turn had he known about the current.

87. In his videotaped deposition, Dr. Karl Bathen testified as to the magnitude, direction, and predictability of the currents affecting the ship at Barbers Point on March 2, 1989. That testimony showed that the currents at the area where the ship stranded changed rapidly during the evening.

88. Exxon failed to show that the current studies done by Dr. Bathen could have been reduced to a format that would be easy for a ship's master to use. Dr. Bathen included a large number of variables in his study, including wind magnitude and direction, tide magnitude and direction, sea magnitude and direction, and bottom depths. The court finds that any current data such as that



presented by Dr. Bathen would have been either extremely difficult to use, or would have yielded only very general results.

89. Captain Coyne would not have used current data such as that prepared by Dr. Bathen had it been available to him on the bridge on March 2, 1989. Captain Coyne's decision to turn to starboard was made in haste without due consideration of several other pieces of information which should have caused him to reject the turn. For example, Captain Coyne decided to turn without looking at the chart, without fixing or plotting the vessel's position since 1830, without checking the NENE's position by radar or radio, and without consulting any of his officers or Captain Marvin. In short, Captain Coyne recklessly ignored all pertinent information that was available to him. The court is therefore convinced that Captain Coyne would not have used any current studies had they been available. Therefore, the absence of such studies was not a cause in fact of the stranding.

#### L. Post-Stranding Changes in SPM Operating Procedures

90. After the events of March 2, 1989, the Coast Guard has required that HIRI provide 30-minute standby tug assistance to tankers at the SPM. The required tugs must be able to handle a disabled tanker in forty knot winds. Had such tug assistance been available on March 2, 1989, Captain Coyne would have used it and the EXXON HOUSTON would not have stranded.

91. In the wake of the EXXON HOUSTON stranding, the Coast Guard has also designated the SPM as a

pilotage area. HIRI is now required to provide two mooring masters with pilot's licenses for ships at the SPM.

### CONCLUSIONS OF LAW

1. This is an admiralty and maritime claim within the meaning of Fed. R. Civ. P. 9(h) and within the admiralty jurisdiction of this Court under 28 U.S.C. § 1333.

2. Pursuant to the Order Granting Motion To Bifurcate, entered on July 31, 1992, and the Order Denying Plaintiffs' Motion For Clarification, entered on August 27, 1992, Phase One of the trial was limited to a determination of issues after the breakout of the EXXON HOUSTON at 1728. Phase Two will explore the causes of the breakout.

3. The court bifurcated the trial because a substantial question existed as to whether the post-breakout navigation of the EXXON HOUSTON constituted a superseding, intervening cause of the stranding.

4. In light of the bifurcation order, the alleged causes of the stranding may be divided into three groups: the causes contributing to the breakout; HIRI's post-breakout violations of the safe berth clause; and Exxon's post-breakout navigation. In order to find that any one of these asserted causes justified the imposition of liability, the court would need to find the breach of a duty, that the breach was a cause in fact, and that the breach was a proximate cause of the stranding.



### A. The Breakout

5. Exxon has alleged that the Defendants are responsible for the breakout and that the breakout was a proximate cause of the stranding.

6. By bifurcating the trial, the court relieved Exxon of the burden of proving in Phase One that Defendants were at fault or strictly liable for the breakout.

7. Obviously, the breakout was a cause in fact of the stranding, i.e., had the mooring chain not parted, the EXXON HOUSTON would not have stranded.

8. As stated in the court's July 31, 1992 bifurcation order, in order to prove that the breakout was a proximate cause, "Exxon would have to show that the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of the grounding." *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982). The question of proximate causation is considered below.

### B. Post-Breakout Breaches of the Safe Berth Clause

9. Exxon claims that HIRI's SPM was an unsafe berth in breach of the safe berth clause in the Voyage Charterparty between Exxon Shipping Company and PRII. Exxon presented three theories of how the duty was breached: that the mooring masters were inadequate; that tug assistance was inadequate; and that current information was inadequate.

10. The court turns first to the scope of the duty. Although this court has previously referred to the safe berth clause as a "safe berth warranty," the court has not

considered the scope of the charterer's duties under a safe berth clause. Exxon argues for the Second Circuit rule that a charterparty's safe berth clause makes a charterer the warrantor of the safety of a berth. See, e.g., *Park S.S. Co. v. Cities Service Oil Co.*, 188 F.2d 804 (2d Cir.), cert. denied, 342 U.S. 862 (1951). HIRI counters that the better rule avoids the imposition of strict liability upon the charterer. Under this rule, a safe berth clause imposes upon the charterer a duty of due diligence to select a safe berth. *Atkins v. Fibre Disintegrating Co.*, 2 Fed. Cas. 78 (E.D.N.Y. 1868) (No. 601), aff'd 85 U.S. (18 Wall.) 272 (1873); *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1157 (5th Cir. 1990). The weight of academic opinion supports the due diligence standard. See Gilmore & Black, *The Law of Admiralty*, § 4-4 at pp.205-207 (2d Ed. 1975); J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul. L. Rev. 860, 862-869 (1975). In the absence of Ninth Circuit authority on the question, the court will follow the persuasive reasoning of the Fifth Circuit's *Orduna* opinion. Thus, the court holds that a safe berth clause imposes on the charterer a duty of due diligence to select a safe berth.

11. Having decided the scope of the safe berth duty, the court turns to whether that duty was breached after the breakout. In the following paragraphs, the court concludes that it was not.

12. The first asserted safe berth breach is the inadequacy of mooring master assistance. Exxon contends that HIRI should have provided two mooring masters, and that they should have been certified pilots. As evidence of this duty, Exxon relies upon the fact that the Coast Guard instituted these requirements after the EXXON

HOUSTON stranded. Over HIRI's objection that these were remedial measures, the court allowed this evidence at trial because the Coast Guard mandated the measures. *See In re Aircrash in Bali, Indonesia*, 871 F.2d 812 (9th Cir.), cert. denied, 493 U.S. 917 (1989).

13. A duly diligent charterer would not have foreseen a need to provide two mooring masters on March 2, 1989. Exxon adduced no evidence that would show that HIRI should have anticipated that additional mooring master assistance was needed. Indeed, even with the hindsight of knowing how the EXXON HOUSTON stranded, the court sees no need for two mooring masters as neither mooring master fatigue nor unavailability played a role in the casualty. Although the bridge was inadequately manned on the evening of March 2, 1989, there were available ship's officers who could have manned the bridge. Captain Coyne's failure to use his own crew does not create a duty on HIRI's part to supply another mooring master.

14. Similarly, the pilot's license requirement has not been shown to be a necessary element of a safe berth. Although a pilot would have been arguably more familiar with local conditions, lack of experience with local conditions did not contribute to the stranding. Captain Marvin had adequate experience to prevent the casualty had Captain Coyne consulted him after 1830. Thus, HIRI satisfied its safe berth duty by providing one competent mooring master, Captain Marvin.

15. Exxon's second theory is that the berth was unsafe because a tug capable of towing a disabled tanker was not available. As evidence of the need for such tug

assistance, Exxon points out that the Coast Guard has instituted this requirement since the EXXON HOUSTON incident.

16. Exxon has not met their burden of showing that a duly diligent charterer would provide tug assistance. Notably absent from Exxon's case was expert opinion as to the industry standard. In assessing due diligence, the court is left only with the Coast Guard requirement and the nature of the EXXON HOUSTON incident itself. The court considers the Coast Guard requirements to be only minimally relevant to the inquiry of whether the need for tug assistance was foreseeable before March 2, 1989. Countering Exxon's claim that tugs should have been required, the EXXON HOUSTON episode itself shows that a tanker could maneuver itself to a safe position without forward propulsion in a heavy storm. The weight of the evidence does not support Exxon's claim that a duly diligent charterer would have provided additional tug assistance on March 2, 1989.

17. The final safe berth theory is that HIRI should have provided detailed current studies of the grounding area. The evidence that a duly diligent charterer would have done such studies is minimal. Unlike the other theories of safe berth breaches, the Coast Guard has not required current studies in the wake of the EXXON HOUSTON stranding. Moreover, Exxon presented no evidence of the industry standard. HIRI did provide an experienced mooring master who briefed the ship's master on environmental conditions. The court concludes that the safe berth clause did not impose any greater duty on HIRI.



18. In summary, the court concludes that after the breakout, HIRI did not breach any duty imposed by the safe berth clause.

### C. Exxon's Negligence

19. The court now turns to whether Exxon negligently navigated the EXXON HOUSTON after the breakout.

20. Captain Coyne and all other officers and crew of the EXXON HOUSTON acted at all times relevant to this claim within the scope of their employment with Exxon, and therefore their negligence, if any, is imputed to Exxon for the purpose of this claim. *Jackson Marine Corp. v. Blue Fox*, 845 F.2d 1307, 1309-1310 (5th Cir. 1988).

21. Per the contract signed by Captain Coyne upon his arrival at the SPM, HIRI's General Instructions, Discharging/Loading Orders and Indemnification, dated March 1, 1989 (Joint Trial Exhibit 92), any negligence of Captain Marvin or of the assist vessel NENE is imputed to Exxon for the purpose of this claim. *Kane v. Hawaiian Independent Refinery, Inc.*, 690 F.2d 722, 723 (9th Cir. 1982).

22. When a moving vessel strikes a charted reef, it is presumed that the vessel is at fault. *The Louisiana*, 70 U.S. (3 Wall.) 164, 173 (1865); *Wardell v. Department of Transp.*, 884 F.2d 510, 512 (9th Cir. 1989); *McAllister Bros., Inc. v. United States*, 709 F.Supp. 1237, 1251 (S.D.N.Y.) (charted reef), *aff'd* 890 F.2d 582 (2d Cir. 1989). Because the EXXON HOUSTON stranded on a charted reef, the presumption of *The Louisiana* rule applies.

23. The presumption of fault pursuant to *The Louisiana* rule suffices to make a *prima facie* case against the moving vessel. The presumption does not disappear when conflicting evidence is presented, but must be overcome by a preponderance of the evidence. *Wardell*, 884 F.2d at 513. *The Louisiana* Rule presumption is universally described as "strong", and as one that places a "heavy burden" on the moving ship to overcome. *Id.* at 512-513 (citing *Carr v. Hermosa Amusement Corp., Ltd.*, 137 F.2d 983, 987 (9th Cir. 1943), *cert. denied*, 321 U.S. 764 (1944)).

24. The strong presumption of negligence arising under *The Louisiana* rule can be rebutted by showing, by a preponderance of the evidence, either that the collision was the fault of a stationary object, that the moving vessel acted with reasonable care, or that the collision was an unavoidable accident. *Wardell*, 884 F.2d at 513 (citing *Bunge Corp. v. M/V Furness Bridge*, 558 F.2d 790, 795 (5th Cir. 1977), *cert. denied*, 435 U.S. 924 (1988)); *Weyerhaeuser Co. v. Atropos Island*, 777 F.2d 1344, 1347 (9th Cir. 1985).

25. The EXXON HOUSTON has failed to meet its *Louisiana* rule burden of proving by a preponderance of the evidence that the EXXON HOUSTON acted with reasonable care, or that the stranding was unavoidable. Thus, the court concludes that Exxon was negligent in the navigation of the EXXON HOUSTON on March 2, 1989, and that such negligence was a proximate cause of the stranding.



26. The admiralty law further presumes that when a vessel violates a statutory rule meant to prevent strandings, the violation was a proximate cause of the stranding. *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873); *Mathes v. The Clipper Fleet*, 774 F.2d 980, 982 (9th Cir. 1985); *Waterman S.S. Corp. v. Gay Cottons*, 414 F.2d 724, 736 (9th Cir. 1969) (*Pennsylvania* rule applies to strandings).

27. The presumption arising under *The Pennsylvania* rule can be rebutted by a "clear and convincing showing of no proximate cause." *Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 825 (9th Cir. 1988).

28. At all times relevant to this claim, the Navigation Safety Regulations codified in Part 164 of Title 33 of the Code of Federal Regulations applied mandatorily to the EXXON HOUSTON and her crew. See 33 C.F.R. § 164.01.

29. The Navigation Safety Regulations provide in relevant part:

§ 164.11 Navigation Underway: General.

The owner, master or person in charge of each vessel underway shall ensure that:

(a) The wheelhouse is constantly manned by persons who:

(1) Direct and control the movement of the vessel; and

(2) Fix the vessel's position;

...

(c) The position of the vessel at each fix is plotted on a chart of the area and the person

directing the movement of the vessel is informed of the vessel's position;

33 C.F.R. § 164.11.

30. The rule of *The Pennsylvania* applies to the EXXON HOUSTON. The EXXON HOUSTON was in violation of the following statutory rules designed to prevent strandings:

a. Between 1830 and 2004, while the EXXON HOUSTON was under way approximately one mile or less from the shore of Oahu, Captain Coyne failed to have the position of the vessel fixed and plotted on a navigational chart, in violation of 33 C.F.R. § 164.11(c).

b. Between 1948 and 2000, during which time the EXXON HOUSTON was under way approximately one mile or less from the shore of Oahu, Captain Coyne was the only officer on the bridge, and was not capable of both directing and controlling the movement of the vessel and fixing the vessel's position, in violation of 33 C.F.R. § 164.11(a).

31. Exxon failed to sustain its burden, under *The Pennsylvania* Rule, of proving by clear and convincing evidence that the above-cited statutory violations could not have caused the stranding of the EXXON HOUSTON. Therefore, the court finds that these statutory violations were a proximate cause of the stranding of the EXXON HOUSTON.

32. In the section that follows, the court has also considered whether Captain Coyne's conduct was negligent without applying the *Pennsylvania* or *Louisiana* rules.

33. Exxon has argued that the EXXON HOUSTON was *in extremis* from the time of the breakout to the time of the stranding, and that Captain Coyne's conduct should be judged by that more lenient standard. See *The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851) and subsequent cases.

34. As Captain Coyne's decisions were made calmly, deliberately and without the pressure of an imminent peril, the *in extremis* rule cannot be applied in this case.

35. In considering whether Captain Coyne was negligent, the court has measured his conduct against the standard of "such reasonable care and maritime skill as prudent navigators employ for performance of similar service." *Stevens v. The White City*, 285 U.S. 195 (1932).

36. Captain Coyne acted negligently, unreasonably and in violation of the maritime industry standards in the following instances:

a. He did not deploy sufficient chain to anchor the ship at 1747.

b. He did not request assistance from the Coast Guard or other available ships.

c. He did not attempt to anchor the ship again after 1747. Anchoring the ship would have prevented the hose removal from becoming a distraction to safe navigation.

d. He failed to continue backing the vessel after 1830 until the vessel reached a safe distance from the shore.

e. He chose to linger in the vicinity of a lee shore, only .4 to .6 miles from the actual grounding line.

37. Captain Coyne's failure to plot fixes between 1830 and 2004 was grossly and extraordinarily negligent and in violation of the maritime industry standards. The danger of stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON and plotting it on the navigational chart.

38. Captain Coyne's final starboard turn was grossly and extraordinarily negligent and in violation of the maritime industry standards because he commenced it without knowing the vessel's position.

39. Even if Captain Coyne had known the vessel's position at the onset of the final turn, the turn order was still extraordinarily negligent and in violation of the maritime industry standards because it unnecessarily exposed the vessel to the danger of grounding. In light of the vessel's trim, its maneuvering characteristics, the proximity of the beach, and the weather conditions, the turn was beyond the capability of the vessel. The danger of stranding could and would have been avoided had Captain Coyne backed out or ordered a left turn instead of attempting a right turn.

#### D. Causation

40. The determination of whether a cause-in-fact was a proximate cause involves a consideration of "public convenience, of public policy, [and] of a rough sense of justice." *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991) (internal quotations and citations omitted).



41. The analysis of proximate cause involves a determination of whether superseding, intervening causes relieve any earlier causes from legal responsibility. *Pan-Alaska Fisheries, Inc. v. Marine Constr. & Design Co.*, 565 F.2d 1129, 1137-39 (9th Cir. 1977). A defendant asserting the existence of a superseding intervening cause bears the burden of proving it by a preponderance of the evidence.

42. The following considerations are of importance in determining whether an intervening force is a superseding cause of harm to another:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of the operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or on the other hand, is or was not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;
- (e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; and

- (f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

*Restatement (Second) of Torts* § 442 (cited with approval by *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991)).

43. Determining the causes of the breakout is not necessary to a determination of whether the EXXON HOUSTON's navigation was a superseding, intervening cause of the stranding. When remoteness in time or extraordinarily negligent intervening acts are established, disputed facts regarding the extent of defendant's negligence will not prevent a judgment in favor of defendant. See, e.g., *Gilmore v. Shell Oil Co.*, 613 So.2d 1272 (Ala. 1993); *Greiner v. Whitesboro Sch. Dist.*, 562 N.Y.S.2d 255 (N.Y. App. Div. 1990) (remoteness), *appeal den.*, 557 N.E.2d 1057 (N.Y. 1991); *Brazell v. Board of Educ.*, 557 N.Y.S.2d 645 (N.Y. App. Div. 1990) (extraordinary intervening negligence); cf. *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 650-53 (5th Cir. 1992) (considering only the factors of the *Restatement (Second) of Torts* § 442 in denying summary judgment motion on superseding, intervening cause).

44. The extraordinary negligence of Captain Coyne in failing to fix and plot his vessel's position superseded any force generated by the breakout of the vessel from the SPM as a cause of the stranding and was the sole proximate cause of the stranding of the EXXON HOUSTON. The analysis of the factors listed in the *Restatement (Second) of Torts* § 442 mandates this conclusion:



a. The failure to plot fixes of the vessel after 1830 caused a fully operational vessel which was at that time free of any encumbrances to her navigation to strand on a charted reef not adjacent to HIRI's SPM. That is a harm different in kind from that which would otherwise have and previously had resulted from a breakout. *Id.* § 442(a). The harm that the breakout risked was that a disabled ship would have been driven onto the shore before it could reach safety. The EXXON HOUSTON had reached a safe position and only the gross negligence of its master put it into further danger.

b. Both Captain Coyne's failure to plot fixes of his vessel's position after 1830 and the fact that the vessel stranded almost three hours after the breakout are highly extraordinary rather than normal. *Id.* § 442(b).

c. Captain Coyne's failure to plot fixes after 1830 was entirely independent of the fact of breakout; he voluntarily decided not to plot fixes in a situation where he was able to plot fixes. *Id.* § 442(c).

d. The failure to plot fixes after 1830 was solely Captain Coyne's omission in which Defendants did not participate and could not have participated. *Id.* § 442(d). Captain Coyne was aware of the danger of being set toward the lee shore and negligently failed to avoid it. Therefore, Captain Coyne's negligence is viewed as an intervening force and superseding cause which became the sole proximate cause of the stranding.

e. Captain Coyne's failure to plot fixes after 1830 carries a very high degree of culpability. *Id.* § 442(f). It was a voluntary, unforced decision, and it was grossly

negligent and in violation of all applicable industry standards and regulations.

45. Captain Coyne's extraordinary negligence in ordering the final starboard turn was also a superseding, intervening cause. Applying the factors listed in the *Restatement (Second) of Torts* § 442, the court finds as follows:

a. The harm resulting from the final turn was the stranding at a point far from the SPM. The harm that could have resulted from the breakout was a grounding before the ship regained control. These harms are different in kind. *Id.* § 442(a).

b. Captain Coyne's attempt to turn the ship towards the coast was extraordinarily negligent and not a foreseeable consequence of the breakout. *Id.* § 442(b).

c. The decision to make the final turn was made independently of the breakout and was not foreseeable. *Id.* § 442(c).

d. The Defendants did not participate in the decision to turn the ship. *Id.* § 442(d).

e. The final turn was highly culpable and grossly negligent. *Id.* § 442(f).

46. In summary, the Defendants are not legally responsible for the stranding of the EXXON HOUSTON. Although the breaking of the mooring chain imperilled the ship, the EXXON HOUSTON successfully avoided that peril. By 1830, the EXXON HOUSTON was heading out to sea and in no further danger of stranding. Only the grossly negligent actions of its master endangered the vessel further. Captain Coyne inexplicably chose to loiter

in a dangerous area without fixing his position. Then, while overly concerned by an injury to a crew member, he drove the ship onto a charted reef. It would be manifestly unjust to hold anyone legally responsible for the consequences of these acts other than Captain Coyne and his employer, Exxon.

IT IS SO ORDERED.

DATED: Honolulu, Hawaii, MAY 20 1993

/s/ Harold M. Fong  
UNITED STATES DISTRICT  
JUDGE

EXXON SHIPPING COMPANY, *et al.* v. PACIFIC  
RESOURCES, INC., *et al.*; Civ. No. 90-00271 HMF; FIND-  
INGS OF FACT AND CONCLUSIONS OF LAW

# CASE & LYNCH

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## IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY	)	CIVIL NO. 90-00271
and EXXON COMPANY,	)	HMF
U.S.A. (A Division of Exxon	)	NOTICE OF
Corporation),	)	MOTION; MOTION
Plaintiffs,	)	OF DEFENDANT/
vs.	)	THIRD-PARTY
PACIFIC RESOURCES, INC.;	)	DEFENDANT
HAWAIIAN INDEPENDENT	)	BRIDON FIBRES
REFINERY, INC.; PRI MARINE	)	AND PLASTICS, LTD.
INC.; PRI INTERNATIONAL,	)	TO DIRECT ENTRY
INC.; and SOFEC, INC.,	)	OF A FINAL
Defendants.	)	JUDGMENT UPON
and	)	PLAINTIFFS' CLAIMS
PACIFIC RESOURCES, INC.;	)	FOR DAMAGES
HAWAIIAN INDEPENDENT	)	CAUSED BY THE
REFINERY, INC.; PRI MARINE	)	GROUNDING OF
INC, and PRI	)	THE EXXON
INTERNATIONAL INC.,	)	HOUSTON;
Third-Party	)	MEMORANDUM IN
Plaintiffs,	)	SUPPORT OF
vs.	)	MOTION;
	)	CERTIFICATE OF
	)	SERVICE
	)	(Filed Jan. 12, 1994)

BRIDON FIBRES AND	)	HEARING DATE:
PLASTICS, LTD.; GRIFFIN	)	MAR 14 1994
WOODHOUSE, LTD. and	)	HEARING TIME:
WERTH ENGINEERING,	)	10:30 AM
INC.,	)	JUDGE:
	)	<u>HAROLD M. FONG</u>
Third-Party	)	
Defendants.	)	

2120d

NOTICE OF MOTION

TO:

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 GRIFFIN WOODHOUSE, LTD.

NOTICE IS HEREBY GIVEN that the above-identified Motion of Defendant/Third-Party Defendant Bridon Fibres and Plastics, Ltd. to Direct Entry of a Final Judgment Upon Plaintiffs' Claims for Damages Caused by the Grounding of the Exxon Houston shall come on for hearing before the Honorable HAROLD M. FONG, Judge of the above-entitled Court, in his courtroom in the United States Courthouse, PJKK Federal Building, 300 Ala Moana Boulevard, Honolulu, Hawaii 96813, on MAR 14, 1994, at 10:30 o'clock A.M., or as soon thereafter as counsel may be heard.

DATED: Honolulu, Hawaii, JAN 12 1994.



/s/ David W. Proudfoot  
 DAVID W. PROUDFOOT  
 NENAD KREK  
 Attorneys for Defendant  
 and Third-Party Defendant  
 BRIDON FIBRES AND  
 PLASTICS, LTD.

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY	)	CIVIL NO. 90-00271
and EXXON COMPANY, U.S.A.	)	HMF
(A Division of Exxon	)	MOTION OF
Corporation),	)	DEFENDANT/
	)	THIRD-PARTY
Plaintiffs,	)	DEFENDANT
	)	BRIDON FIBRES
vs.	)	AND PLASTICS, LTD.
PACIFIC RESOURCES, INC.;	)	TO DIRECT ENTRY
HAWAIIAN INDEPENDENT	)	OF A FINAL
REFINERY, INC.; PRI MARINE	)	JUDGMENT UPON
INC.; PRI INTERNATIONAL,	)	PLAINTIFFS' CLAIMS
INC.; and SOFEC, INC.,	)	FOR DAMAGES
Defendants.	)	CAUSED BY THE
	)	GROUNDING OF
and	)	THE EXXON
PACIFIC RESOURCES, INC.;	)	HOUSTON
HAWAIIAN INDEPENDENT	)	
REFINERY, INC.; PRI MARINE	)	
INC, and PRI INTERNATIONAL	)	
INC.,	)	
Third-Party	)	
Plaintiffs,	)	

vs.	)
BRIDON FIBRES AND	)
PLASTICS, LTD.; GRIFFIN	)
WOODHOUSE, LTD. and	)
WERTH ENGINEERING, INC.,	)
Third-Party	)
Defendants.	)

2120d

MOTION OF DEFENDANT/THIRD-PARTY DEFEN-  
DANT BRIDON FIBRES AND PLASTICS LTD. TO  
DIRECT ENTRY OF A FINAL JUDGMENT UPON  
PLAINTIFFS' CLAIMS FOR DAMAGES CAUSED BY  
THE GROUNDING OF THE EXXON HOUSTON

Comes now Defendant and Third-Party Defendant Bridon Fibres and Plastics, Ltd., and moves this Court, pursuant to Fed. R. Civ. P. 54(b), to direct entry of a final judgment against Plaintiffs upon their claim for damages caused by the grounding of the EXXON HOUSTON, including the loss of the vessel and the costs of clean-up of the oil spill from the EXXON HOUSTON at the moment of grounding and thereafter.

DATED: Honolulu, Hawaii, JAN 12 1994

/s/ David W. Proudfoot  
 DAVID W. PROUDFOOT  
 NENAD KREK  
 Attorneys for Defendant and  
 Third-Party Defendant  
 BRIDON FIBRES AND  
 PLASTICS, LTD.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY )	CIVIL NO.
and EXXON COMPANY, )	90-00271 HMF
U.S.A. (A Division of Exxon )	MEMORANDUM
Corporation), )	IN SUPPORT OF
Plaintiffs, )	MOTION
vs. )	
PACIFIC RESOURCES, INC.; )	
HAWAIIAN INDEPENDENT )	
REFINERY, INC.; PRI MARINE )	
INC.; PRI INTERNATIONAL, )	
INC.; and SOFEC, INC., )	
Defendants. )	
and )	
PACIFIC RESOURCES, INC.; )	
HAWAIIAN INDEPENDENT )	
REFINERY, INC.; PRI MARINE )	
INC and PRI )	
INTERNATIONAL INC., )	
Third-Party )	
Plaintiffs, )	
vs. )	
BRIDON FIBRES AND )	
PLASTICS, LTD.; GRIFFIN )	
WOODHOUSE, LTD. and )	
WERTH ENGINEERING, INC., )	
Third-Party )	
Defendants. )	

2120d

MEMORANDUM IN SUPPORT OF MOTION

I. INTRODUCTION

This motion is an attempt to move this case toward the most cost-effective final resolution and to avoid a futile and very expensive Phase Two trial. The Court is familiar with the case and only the facts directly relevant to this motion will be reiterated as appropriate in this memorandum.

Rule 54(b) provides in relevant part as follows:

When more than one claim for relief is presented in an action, whether as a claim, counter-claim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment.

The requirements of Fed. R. Civ. P. 54(b) are clearly met in this instance and it is respectfully requested that the Court exercise its discretion in favor of directing entry of a final judgment upon Exxon's claims for damages caused by the grounding of the EXXON HOUSTON which were fully adjudicated by the Court's Phase One Findings of Fact and Conclusions of Law entered on May 20, 1993 herein.

## II. THE COURT CAN DIRECT ENTRY OF A FINAL JUDGMENT ON EXXON'S CLAIM FOR DAMAGES CAUSED BY THE GROUNDING OF THE EXXON HOUSTON

By its Order entered on July 31, 1992 ("Order"), this Court bifurcated the trial in this case

so that the first phase of the trial will be limited to the issue of causation with respect to the EXXON HOUSTON's grounding, but not including the issue of causation with respect to the breakout itself.

Order at p. 16.

On May 20, 1993, after Phase One of the trial, the Court entered its Findings of Fact and Conclusions of Law, finding Plaintiffs ("Exxon") entirely and solely at fault for the grounding of the EXXON HOUSTON. The Court also found that Exxon's fault was an intervening force which superseded any causation which may have originated from the breakout of the vessel from the Single Point Mooring. These Findings and Conclusions have entirely adjudicated Exxon's \$10 Million damage claim for loss of the EXXON HOUSTON. As the Court has expressly found that Exxon was solely at fault for the loss of the vessel, Exxon cannot recover anything on that claim from any of the parties to this case. The Findings and Conclusions have also adjudicated and terminated Exxon's claim for costs of the clean-up of the oil which spilled from the EXXON HOUSTON at the moment of grounding and thereafter.

## III. THERE IS NO JUST CAUSE FOR DELAY

In this case, a failure to direct entry of a final judgment at this time would necessitate a futile and disproportionately expensive trial. As there are no compelling reasons not to direct entry of a final judgment, there indeed is "no just reason for delay". An outline of relevant facts is useful here to give the Court the full flavor of the situation.

The Court's Findings and Conclusions plainly eliminated Exxon's entire claim of up to \$10 Million for the loss of the EXXON HOUSTON. Moreover, the Findings & Conclusions also eliminated most of Exxon's Phase Two claim of some \$2.4 Million for the oil spill clean-up costs. That is because most clean-up items were related to the bunker oil spill caused by the grounding, and the precautionary measures taken by Exxon in anticipation that the tanker might break up on the reef, causing a catastrophic spill. In Bridon's estimate, at most \$200,000 of clean up costs was conceivably related to the alleged first spill caused by the breakout and tearing of the oil hoses. While Exxon has never accepted Bridon's analysis, Bridon believes that, for the purposes of this motion, Exxon will not dispute that the value of its remaining Phase Two claims is in the order of magnitude as stated.

To determine and apportion the liability for Exxon's remaining claim of approximately \$200,000, the parties would have to go through the extremely expensive discovery and trial of the causation of the breakout of the vessel from the Single Point Mooring. The cost of such discovery and trial would exceed the amount in dispute many times, and conceivably tenfold. Yet, so long as the



Court's Phase One decision remains subject to reversal or change on appeal, the parties could not afford to try the remaining case in a less elaborate fashion consistent with the nominal amount in dispute, because of the potential collateral estoppel effects.

For example, given the \$200,000 claim, it would not seem horribly important whether a given Defendant were to end up with zero liability or 25 percent liability for the breakout. However, if, after the final judgment, the Phase One decision were reversed on appeal and it were eventually determined that the grounding was directly caused by the breakout, that Defendant would be facing 25 percent of a \$12 Million judgment. In other words a \$50,000 judgment would be reincarnated with a vengeance into a \$3 Million judgment.

Because of that, the parties cannot afford to try the remaining \$200,000 claim as a \$200,000 claim. On the other hand, it would be monstrously counter-productive to try a \$200,000 claim as if it were a \$12 Million claim, just because of a faint chance that Exxon's final appeal might be successful. Such a "trial-by-attrition" would be pointless and a monumental waste of the Court's time. Bridon does not believe that any of the parties, including Exxon, has any desire to burn its money in a futile exercise of that kind.<sup>1</sup>

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<sup>1</sup> On June 16, 1993, Exxon purported to notice an interlocutory appeal pursuant to 28 U.S.C. § 1292(a)(3) from the Court's Findings and Conclusions. Noting probable lack of appellate jurisdiction, Bridon filed a motion to dismiss Exxon's interlocutory appeal. On November 4, 1993 the Court of Appeals for the Ninth Circuit entered an Order summarily dismissing the

## V. CONCLUSION

It is respectfully requested that the Court determine that there is no just reason for delay, and that it direct entry of a final judgment upon Exxon's claim damages caused by the grounding of the EXXON HOUSTON, including the loss of the vessel and the costs of clean-up of the spill of oil from the EXXON HOUSTON at the moment of grounding and thereafter.

DATED: Honolulu, Hawaii, JAN 12 1994.

/s/ Nenad Krek  
 DAVID W. PROUDFOOT  
 NENAD KREK  
 Attorneys for Defendant and  
 Third-Party Defendant  
 BRIDON FIBRES AND  
 PLASTICS, LTD.

(Certificate of Service omitted in printing.)

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appeal for lack of appellate jurisdiction.

Bridon had moved to dismiss Exxon's interlocutory appeal solely because of the probable defect in the appellate jurisdiction. Bridon saw no point in briefing an appeal, the result of which could later be set aside by any party unsatisfied by the outcome. In fact, such party could eventually bring an appeal from the final judgment and most likely have it heard by a completely different appellate panel. During the pendency of its motion to dismiss the interlocutory appeal, Bridon suggested to Exxon that it move this Court to direct entry of final judgment upon its Findings and Conclusions pursuant to Rule 54(b), and thus shore up the appellate jurisdiction. Exxon, however, declined to do so at that time. Indeed, recent caselaw seems to view such practice with disfavor.

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IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING	) CIVIL NO. 90-00271 HMF
COMPANY and	) IN ADMIRALTY
EXXON COMPANY,	)
U.S.A. (A Division of	) NOTICE OF MOTION;
Exxon Corporation),	) MOTION OF PLAINTIFFS TO
Plaintiffs,	) DIRECT ENTRY OF A FINAL
vs.	) JUDGMENT UPON THE
	) FINDINGS OF FACT AND
PACIFIC RESOURCES,	) CONCLUSIONS OF LAW
INC., HAWAIIAN	) ENTERED ON MAY 20, 1993,
INDEPENDENT	) AND FOR A STAY;
REFINERY, INC., PRI	) MEMORANDUM IN
MARINE, INC., PRI	) SUPPORT OF MOTION;
INTERNATIONAL,	) CERTIFICATE OF SERVICE
INC., and SOFEC,	)
INC.,	) (Filed Feb. 22, 1994)
Defendants.	)
	) Hearing Date: March 14, 1994
	) Hearing Time: 10:30 a.m.
	) Hearing Judge: Harold M. Fong

NOTICE OF MOTION

TO:

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Attorney for Third-Party Defendant  
GRIFFIN WOODHOUSE, LTD.

NOTICE IS HEREBY GIVEN that the above-identified Motion Of Plaintiffs To Direct Entry Of A Final Judgment Upon The Findings Of Fact And Conclusions Of Law Entered on May 20, 1993, And For A Stay shall come on for hearing before the Honorable Harold M. Fong, Judge of the above-entitled Court, in his courtroom in the United States Courthouse, PJKK Federal Building, 300 Ala Moana Boulevard, Honolulu, Hawaii 96813, on March 14, 1994, at 10:30 o'clock a.m., or as soon thereafter as counsel may be heard.

Dated: Honolulu, Hawaii FEB 22 1994

/s/ Judy S. Givens  
 JUDY S. GIVENS  
 of Attorneys for Plaintiffs  
 EXXON SHIPPING COMPANY, INC.  
 and EXXON COMPANY, U.S.A.

IN THE UNITED STATES DISTRICT COURT  
 FOR THE DISTRICT OF HAWAII

EXXON SHIPPING	) CIVIL NO. 90-00271 HMF
COMPANY and EXXON	) IN ADMIRALTY -
COMPANY, U.S.A. (A	)
Division of Exxon	) MOTION OF PLAINTIFFS
Corporation).	) TO DIRECT ENTRY OF A
Plaintiffs,	) FINAL JUDGMENT
vs.	) UPON THE FINDINGS
PACIFIC RESOURCES,	) OF FACT AND
INC., HAWAIIAN	) CONCLUSIONS OF LAW
INDEPENDENT REFINERY,	) ENTERED ON MAY 20,
INC., PRI MARINE, INC.,	) 1993, AND FOR A STAY
PRI INTERNATIONAL,	)
INC., and SOFEC, INC.,	)
Defendants,	)
and	)
PACIFIC RESOURCES,	)
INC.; HAWAIIAN	)
INDEPENDENT REFINERY,	)
INC., PRI MARINE, INC.,	)
and PRI INTERNATIONAL,	)
INC.,	)
Third-Party	)
Plaintiffs,	)
vs.	)
BRIDON FIBRES AND	)
PLASTICS, LTD., and	)
GRIFFIN WOODHOUSE,	)
LTD.	)
Third-Party	)
Defendants.	)



MOTION OF PLAINTIFFS TO DIRECT ENTRY OF A  
FINAL JUDGMENT UPON THE FINDINGS OF FACT  
AND CONCLUSIONS OF LAW ENTERED ON  
MAY 20, 1993 AND FOR A STAY

Plaintiffs, by and through their undersigned counsel, hereby move the court, pursuant to L.R. 220-9 and Fed. R. Civ. P. 54(b), to direct entry of final judgment upon the Findings of Fact and Conclusions of Law entered by the court on May 20, 1993, and, pursuant to the court's inherent powers, to stay further proceedings in this court until plaintiffs' appeal of the certified judgment has been decided or otherwise disposed of.

Dated: Honolulu, Hawaii FEB 22 1994

/s/ Judy S. Givens  
JUDY S. GIVENS  
of Attorneys for Plaintiffs  
EXXON SHIPPING COMPANY, INC.  
and EXXON COMPANY, U.S.A.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING	)	CIVIL NO. 90-00271 HMF
COMPANY and EXXON	)	IN ADMIRALTY
COMPANY, U.S.A. (A	)	
Division of Exxon	)	MEMORANDUM IN
Corporation),	)	SUPPORT OF MOTION
Plaintiffs,	)	
vs.	)	
PACIFIC RESOURCES,	)	
INC., HAWAIIAN	)	
INDEPENDENT REFINERY,	)	
INC., PRI MARINE, INC.,	)	
PRI INTERNATIONAL,	)	
INC., and SOFEC, INC.,	)	
Defendants,	)	
and	)	
PACIFIC RESOURCES,	)	
INC.; HAWAIIAN	)	
INDEPENDENT REFINERY,	)	
INC., PRI MARINE, INC.,	)	
and PRI INTERNATIONAL,	)	
INC.,	)	
Third-Party	)	
Plaintiffs,	)	
vs.	)	
BRIDON FIBRES AND	)	
PLASTICS, LTD., and	)	
GRIFFIN WOODHOUSE,	)	
LTD.	)	
Third-party	)	
Defendants.	)	

## MEMORANDUM IN SUPPORT OF MOTION

### I. INTRODUCTION.

It would best serve judicial economy, and is also in the best interests of all parties to this litigation, to have the issues raised by the bifurcation of the trial of this matter and by the decision entered following the first phase of trial reviewed and decided by the Court of Appeals before the second phase is tried.

If Bridon's motion is granted, there is a significant risk that the Court of Appeals would find it lacked jurisdiction, for the reasons set forth in plaintiffs' memorandum in opposition to that motion.

However, the Ninth Circuit has displayed a willingness to allow Rule 54(b) certification of orders which may not finally adjudicate a claim when appeal of such issues would best serve efficient judicial administration.

The Ninth Circuit is most likely to find that it has jurisdiction of an appeal of the Findings of Fact and Conclusions of Law if this court directs entry of final judgement on the basis that the legal issues involved are severable and that certification will result in efficient judicial administration.

### II. DISCUSSION.

#### A. THE NINTH CIRCUIT HAS RELAXED THE REQUIREMENT OF A FINAL JUDGMENT IN CASES IN WHICH IMMEDIATE APPELLATE REVIEW WOULD BEST SERVE JUDICIAL EFFICIENCY.

In *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038 (9th Cir., 1991) the Ninth Circuit

reaffirmed its adherence to the traditional Rule 54(b) requirement that at least one but fewer than all claims in multiclaime litigation be finally decided.

However, in *Continental Airlines v. Goodyear Tire & Rubber Co.* 819 F.2d 1519 (9th Cir. 1987), after first paying lip service to that Rule 54(b) requirement, the court abandoned the requirement as unworkable. The court declared that while it was confident that the case involved multiple claims, it was not certain that any claim had been finally adjudicated, noting that "the essence [of a claim] eludes the grasp like quicksilver." 819 F.2d at 1525.

Rather than engaging in the "subtle jurisprudence" involved in determining what constitutes a claim for purposes of Rule 54(b), the court adopted a "pragmatic approach focusing on severability and efficient judicial administration." *Id.*

After noting that the summary judgments certified by the district court had "eliminated none of the parties and left open potentially full recovery in both of Continental's ultimate areas of loss" and acknowledging the possibility that Continental might not have needed to appeal the partial summary judgments that were the subject of the Rule 54(b) certification had the matter proceeded to trial, the court held:

Nonetheless, given the size and complexity of this case, we cannot condemn the district court's effort to carve out threshold claims and thus streamline further litigation. In these partial summary judgments, the district court effectively narrowed the issues, shortened any subsequent trial by months, and efficiently separated

the legal from the factual questions. The matters disposed of by the partial summary judgments were sufficiently severable factually and legally from the remaining matters, and they completely extinguished the liability of the tire companies as to the airplane damage claim. We hold that Rule 54(b) certification was proper under the circumstances of this case.

819 F.2d at 1525.

In this case, Griffin's motion to bifurcate was granted in an effort to carve out threshold claims and thus streamline further litigation. The bifurcation had the effect of shortening trial by at least a month.

Exxon strongly opposed the manner in which trial was bifurcated on the basis that without evidence of events occurring before the second hose parted Exxon would be unable to prove its claims and would thus be severely prejudiced. The manner in which trial was bifurcated will be a primary focus of Exxon's appeal. The fact that the trial was bifurcated and Exxon's objection to the manner in which trial was bifurcated make the Findings of Fact and Conclusions of Law entered following the first phase of trial a particularly appropriate decision for certification. If, as Exxon contends, the bifurcation was improper, the trial of the remaining issues before appellate review of the bifurcation would be a tremendous waste of time and resources.

Although different panels of the Ninth Circuit have applied both Rule 54(b) and *Continental* differently<sup>1</sup>, a recent en banc decision relied on *Continental's* expansive interpretation of Rule 54(b).

In *Hale v. State of Arizona* 993 F.2d 1387 at 1390 (9th Cir., 1993) cert. denied, 114 S.Ct. 386 (1993)<sup>2</sup>, the court, sitting en banc, cited *Continental* in support of its finding of jurisdiction, noting that *Continental* "expansively [construed the] discretion of [the] district court in entering partial summary judgment under Rule 54(b)."

It appears that the Ninth Circuit is willing to relax the requirement of a final judgment in complex cases where immediate appellate review will streamline further litigation.

<sup>1</sup> *Arizona State Carpenters Pension Trust Fund v. Miller*, 938 F.2d 1038, decided July 15, 1991, and amended August 27, 1991, cites *Continental* in support of the traditional prerequisites to entry of final judgment pursuant to Rule 54(b): claims must be multiple and at least one must have been finally adjudicated. 938 F.2d 1039. A different panel of the Ninth Circuit decided *Texaco, Inc. v. Ponsoldt* 939 F.2d 794 on July 25, 1991. The *Texaco* panel cited *Continental* for its holding that certification was proper even if no claim had been finally decided if certification would streamline litigation. 939 F.2d at 798.

<sup>2</sup> *Hale* involved review of two district court decisions, one of which was final and found that prisoners were "employees" for purposes of the Fair Labor Standards Act and the second of which dismissed a number of prisoner claims based upon the Fair Labor Standards Act for lack of jurisdiction, retaining one claim for prospective relief pending the outcome of the appeal. In the second case, the court had entered 54(b) final judgment as to the dismissed claims.



B. JUDICIAL ECONOMY WOULD BE BEST SERVED BY STAYING FURTHER PROCEEDINGS UNTIL THE APPEAL HAS BEEN DECIDED.

The court has inherent power to stay proceedings until the Court of Appeals has issued a decision on Exxon's appeal or until the appeal has been otherwise terminated. *Landis v. North Am. Co.* 299 U.S. 248, 254 (1936).

While Exxon disagrees with Bridon's description of the effect of the Findings of Fact and Conclusions of Law and with its valuation of Exxon's oil spill clean-up claim, Exxon otherwise adopts the argument set forth in Section III of Bridon's Memorandum, pp. 3-5, in support of its motion for a stay.

III. CONCLUSION.

The Findings of Fact and Conclusions of Law entered in this case on May 20, 1993, are not suitable for entry of final judgment pursuant to Rule 54(b) as that Rule has traditionally been interpreted. It is very likely, however, that the Court of Appeals would find certification proper if an order entering final judgment included findings that certification would streamline further litigation and serve the interests of judicial efficiency.

It is respectfully requested that the Court determine that entry of final judgment with respect to the Findings of Fact and Conclusions of Law will result in efficient judicial administration, that the legal issues involved are severable and that there is no just reason for delay, and

that it direct entry of final judgment on the Findings of Fact and Conclusions of Law entered on May 20, 1993.

Dated: Honolulu, Hawaii FEB 22 1994

/s/ Judy S. Givens  
JUDY S. GIVENS  
of Attorneys for Plaintiffs  
EXXON SHIPPING COMPANY, INC.  
and EXXON COMPANY, U.S.A.

(Certificate of Service omitted in printing.)

---

## CASE &amp; LYNCH

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Third-Party Defendant

BRIDON FIBRES &amp; PLASTICS, LTD.

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAIIEXXON SHIPPING  
COMPANY and EXXON  
COMPANY, U.S.A. (A  
Division of Exxon  
Corporation),

Plaintiffs,

vs.

PACIFIC RESOURCES,  
INC.; HAWAIIAN  
INDEPENDENT REFINERY,  
INC.; PRI MARINE, INC.;  
PRI INTERNATIONAL,  
INC.; and SOFEC, INC.,

Defendants.

and

) CIVIL NO. 90-00271 HMF

)

) ORDER DIRECTING

) ENTRY OF A FINAL

) JUDGMENT PURSUANT

) TO FED. R. CIV. P. 54(b)

) UPON LESS THAN ALL

) CLAIMS AND AS TO

) LESS THAN ALL

) PARTIES

) (Filed Mar. 31, 1994)

)

) HEARING

)

) DATE: March 14, 1994

) TIME: 10:30 a.m.

) JUDGE: Honorable

) Harold M. Fong

)

PACIFIC RESOURCES, )  
INC.; HAWAIIAN )  
INDEPENDENT REFINERY, )  
INC.; PRI MARINE, INC.; )  
and PRI INTERNATIONAL, )  
INC., )Third-Party  
Plaintiffs, )

vs. )

BRIDON FIBRES AND )  
PLASTICS, LTD.; GRIFFIN )  
WOODHOUSE, LTD., and )  
WERTH ENGINEERING, )  
INC., )Third-Party  
Defendants. )ORDER DIRECTING ENTRY OF A FINAL JUDGMENT  
PURSUANT TO FED. R. CIV. P. 54(b)  
UPON LESS THAN ALL OF CLAIMS AND  
AS TO LESS THAN ALL PARTIES

This cause came up for a hearing on Monday, March 14, 1994 at 10:30 a.m. before the Honorable Harold M. Fong, United States District Judge, upon a Motion of Defendant Bridon Fibres And Plastics, Ltd. To Direct Entry Of A Final Judgment Upon Plaintiffs' Claims For Damages Caused By The Grounding Of The Exxon Houston, and a (Cross-)Motion Of Plaintiffs Exxon Shipping Company and Exxon Company, U.S.A. To Direct Entry Of A Final Judgment Upon The Findings Of Fact And Conclusions Of Law Entered On May 20, 1993, And For A Stay. Nenad Krek, Esq., appeared on behalf of

Defendant Bridon Fibres and Plastics, Ltd., Judy S. Givens, Esq., appeared on behalf of Plaintiffs, Randall K. Schmitt, Esq., appeared on behalf of Defendant Sofec, Inc., Howard G. McPherson, Esq., appeared on behalf of Defendant Griffin Woodhouse, Ltd., and Janine R. Kimball, Esq., appeared on behalf of Defendants Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc. The Court has reviewed memoranda submitted by the parties, has received oral argument of counsel and has been in all respects fully briefed.

In its Findings of Fact and Conclusions of Law, entered on May 20, 1993, the Court determined that the negligence of Plaintiffs "superseded any force generated by the breakout of the vessel from the SPM as a cause of the stranding and was the sole proximate cause of the stranding of the EXXON HOUSTON" (CL 44). *See also* CL 45 and CL 46. The Court finds that said Findings of Fact and Conclusions of Law have fully adjudicated all Plaintiffs' claims for damages caused by the stranding of the EXXON HOUSTON, i.e., all of Plaintiffs' claims against all other parties for the loss of the vessel, and all of Plaintiffs' claims against Sofec, Inc., Bridon Fibres and Plastics, Ltd., and Griffin Woodhouse, Ltd., for recovery of the costs of clean-up of the bunker oil spill which resulted from the stranding.

The Court further finds, pursuant to Fed. R. Civ. P. 54(b), that there is no just reason for delay of entry of a final judgment on those fully adjudicated claims. The issues and claims disposed of by the Court's Findings of Fact and Conclusions of Law are factually and legally

separable from the remaining issues and claims. Moreover, the Court finds that, given the size and complexity of this case, direction of entry of a final judgment is necessary at this time in order to promote efficient judicial administration and streamline further litigation.

Now, therefore, good cause appearing, it is hereby

ORDERED, ADJUDGED and DECREED that:

1. Pursuant to Fed. R. Civ. P. 54(b), it is expressly determined that there is no just cause for delay of the entry of a final judgment herein.

2. The Clerk of this Court is directed to enter a final judgment against Plaintiffs on all causes of action stated in their Complaint as follows:

A. In favor of all Defendants on Plaintiffs' claim for damages to and loss of the EXXON HOUSTON; and

B. In favor of Defendants Sofec, Inc., Bridon Fibres and Plastics, Ltd., and Griffin Woodhouse, Ltd., on Plaintiffs' claim for recovery of costs of clean-up of the bunker oil spill.

DATED: Honolulu, Hawaii, MAR 31 1994.

HAROLD M. FONG  
UNITED STATES  
DISTRICT JUDGE



## APPROVED AS TO FORM:

- /s/ Judy S. Givens  
 JUDY S. GIVENS ESQ.  
 Attorney for Plaintiffs  
 EXXON SHIPPING COMPANY, INC. and  
 EXXON COMPANY, U.S.A
- /s/ Randall K. Schmitt  
 RANDALL K. SCHMITT, ESQ.  
 Attorney for Defendant  
 SOFEC, INC.
- /s/ H. G. McPherson  
 HOWARD G. McPHERSON, ESQ.  
 Attorney for Third-Party Defendant  
 GRIFFIN WOODHOUSE, LTD.
- /s/ Janine Kimball  
 JANINE KIMBALL, ESQ.  
 Attorney for Defendants  
 PACIFIC RESOURCES, INC., HAWAIIAN  
 INDEPENDENT REFINERY, INC., PRI  
 MARINE, INC. and PRI INTERNATIONAL, INC.
- 

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UNITED STATES DISTRICT COURT  
 DISTRICT OF HAWAII

---

EXXON SHIPPING  
 COMPANY, et al.,

Plaintiffs,

V.

PACIFIC RESOURCES,  
 INC., et al.,

Defendants.

JUDGMENT IN A  
 CIVIL CASE

CASE NUMBER:

90-00271HMF

(Filed Apr. 20, 1994)

- [ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.
- [X] **Decision by Court.** This action came for hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

that pursuant to Fed. R. Civ. P. 54(b), final judgment is hereby entered against plaintiffs on all causes of action stated in their complaint as follows:

- A. In favor of all Defendants on Plaintiffs' claim for damages to and loss of the Exxon Houston; and

APR 20 1994  
Date

/s/ Walter A. Y. H. Chinn  
Clerk

cc:all parties

(By) Deputy Clerk

**JUDY S. GIVENS 4435**  
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**Attorneys for Plaintiffs**  
**EXXON SHIPPING COMPANY, INC.**  
**and EXXON COMPANY, U.S.A.**

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

EXXON SHIPPING COMPANY )	CIVIL NO.
and EXXON COMPANY, U.S.A. )	90-00271 HMF
(A Division of Exxon )	(In Admiralty)
Corporation), )	
Plaintiffs, )	NOTICE OF
vs. )	APPEAL BY
PACIFIC RESOURCES, INC., )	PLAINTIFFS
HAWAIIAN INDEPENDENT )	EXXON SHIPPING
REFINERY, INC., PRI MARINE, )	COMPANY, INC.
INC., PRI INTERNATIONAL, )	AND EXXON
INC., and SOFEC, INC., )	COMPANY, U.S.A.;
Defendants, )	CERTIFICATE OF
and )	SERVICE
	(Filed
	Apr. 25, 1994)

PACIFIC RESOURCES, INC.; )  
 HAWAIIAN INDEPENDENT )  
 REFINERY, INC., PRI MARINE, )  
 INC., and PRI )  
 INTERNATIONAL, INC., )

Third-Party )  
 Plaintiffs, )

vs. )

BRIDON FIBRES AND )  
 PLASTICS, LTD., and GRIFFIN )  
 WOODHOUSE, LTD. )

Third-Party )  
 Defendants. )

NOTICE OF APPEAL BY PLAINTIFFS EXXON SHIP-  
PING COMPANY, INC. AND EXXON COMPANY, U.S.A.

Notice is hereby given that Plaintiffs EXXON SHIP-  
 PING COMPANY, INC. and EXXON COMPANY, U.S.A.  
 ("EXXON"), by and through their attorneys Fukunaga  
 Matayoshi Hershey Kuriyama & Ching, hereby appeal to  
 the United States Court of Appeals for the Ninth Circuit  
 from the Final Judgment entered in this action on April  
 20, 1994.

Dated: Honolulu, Hawaii APR 25 1994

/s/ Judy S Givens

JUDY S. GIVENS

of Attorneys for Plaintiffs  
 EXXON SHIPPING COMPANY,  
 INC.  
 and EXXON COMPANY, U.S.A.

(Certificate of Service omitted in printing.)

**FOR PUBLICATION**  
**UNITED STATES COURT OF APPEALS**  
**FOR THE NINTH CIRCUIT**

EXXON COMPANY; EXXON SHIPPING )  
 COMPANY, )

*Plaintiffs-Counter-defendants-*  
*Third-Party Defendants-*  
*Appellants,* )

v. )

SOPEC, INC., )

*Defendant-Counter-claimant-*  
*Appellee,* )

No. 94-15806

PACIFIC RESOURCES, INC.; HAWAIIAN )  
 INDEPENDENT REFINERY, INC.; PRI )  
 MARINE, INC.; PRI INTERNATIONAL, )  
 INC., )

D.C. No.  
 CV-90-0271-HMF

*Defendants-Cross-claimants-*  
*Third-Party Plaintiffs-Appellees,* )

v. )

GRIFFIN WOODHOUSE, Griffin )  
 Woodhouse, Inc., )

*Third-Party Defendant-Appellee,* )

BRIDON FIBRES AND PLASTICS, LTD., )

*Defendant-Third-Party Defendant-*  
*Appellee.* )

OPINION



Appeal from the United States District Court  
for the District of Hawaii  
Harold M. Fong, Chief District Judge, Presiding

Argued and Submitted  
March 14, 1995 – San Francisco, California

Filed April 26, 1995

Before: William C. Canby, Jr., Charles Wiggins,  
and Thomas G. Nelson, Circuit Judges.

Opinion by T.G. Nelson

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### SUMMARY

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#### Admiralty and Marine/Negligence/ Civil Litigation and Procedure

The court of appeals affirmed a district court order. The court held that the district court did not err in finding a captain's extraordinary negligence to be the sole proximate and superseding cause of damage to a vessel that broke away from a mooring system and later ran aground.

The Exxon *Houston*, a tanker belonging to appellants Exxon Shipping Co. and Exxon Company U.S.A. (Collectively, Exxon), broke away from a Single Point Mooring System (SPM) manufactured by appellee Sofec, Inc. and sold by appellee Pacific Resources, Inc. and associated corporations (collectively, HIRI). A storm had caused a break in the chafe chain linking the vessel to the SPM. As the vessel drifted, two oil hoses broke away from the SPM, and one hose interfered with the ship's ability to maneuver.

Immediately after the second hose parted (the "breakaway"), the Coast Guard contacted the *Houston* to see whether it needed assistance. Captain Kevin Coyne refused the offer. During the 2 hours and 4 minutes following the breakout, Coyne took the ship through a series of phases including an attempt to anchor. Coyne failed to plot the ship's position on the chart for a period of time, relying entirely on parallel indexing. For a time, Captain Coyne was alone on the bridge. He proceeded to make a final turn toward shore, which resulted in the ship's stranding. The ship ran aground.

Exxon filed a complaint in admiralty against HIRI and Sofec for the loss of its ship and cargo, and for oil spill cleanup costs. HIRI filed a third-party complaint against appellees Bridon Fibres and Plastics, Ltd. and Griffin Warehouse, Ltd. Griffin moved to bifurcate the trial, and all defendants joined the motion. The district court granted the motion, limiting the first phase of the trial to the issue of causation with respect to the *Houston's* grounding, leaving the issue of causation with respect to the breakout for Phase Two.

The district court found that Coyne's extraordinary negligence was the sole proximate and superseding cause of the ship's grounding. Following motions by Bridon and Exxon, the court entered a final motion precluding all of Exxon's claims for loss of the vessel. Exxon appealed, contending that the district court improperly bifurcated the proceedings and that the doctrine of superseding cause has not application to cases in admiralty.

[1] In *United States v. Reliable Transfer Co.*, the Supreme Court rejected the rule whereby damages were divided equally between or among negligent vessels regardless of the degree of fault attributable to each. [2] The Ninth Circuit has affirmed the continuing viability of superseding cause in the maritime context. The Ninth Circuit previously held that an intervening force supersedes prior negligence where the subsequent actor's negligence was "extraordinary." [3] Thus, superseding cause may act to cut off liability for antecedent acts of negligence in admiralty cases where the superseding cause is the result of extraordinary negligence. The district court did not "disobey" *Reliable Transfer* in employing the concept of superseding cause in this case.

[4] Exxon was incorrect in arguing that it was unfairly prejudiced by the bifurcation. [5] The district court assumed at the outset of Phase One that the defendants' negligence was a cause in fact of the grounding. [6] Moreover, even if Exxon's theory that the HIRI defendants were strictly liable as warrantors of safe berth was accepted, such a finding would not have rendered erroneous either the district court's bifurcation of the trial or its superseding cause analysis. [7] The district court's decision to bifurcate the trial could not be said to have "severed the unseverable" or to have prejudiced Exxon. Bifurcation of the trial was expeditious and appropriate in light of the circumstances of the case.

[8] Under the rule of *The Louisiana*, when a moving vessel strikes a charted reef, it is presumed the vessel is at fault. [9] *The Pennsylvania* stands for the presumption that when a vessel violates a statutory rule meant to prevent

strandings, the violation was a proximate cause of the stranding. [10] In this case, the *Houston* struck a charted reef because her captain had not bothered to fix her position. Exxon neither rebutted nor offered any compelling reason to ignore the traditional admiralty rules laid out in *The Pennsylvania* and *The Louisiana*.

[11] In addition, the district court did not err in holding Coyne to a reasonable standard of care. [12] The district court's finding that Coyne's failure to take fixes was extraordinarily negligent was supported by the record. [13] The district court's finding that the final starboard turn was extraordinarily negligent was also supported by the record. [14] The district court did not clearly err in finding that Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout.

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#### COUNSEL

Shirley M. Hufstedler, Hufstedler & Kaus, Los Angeles, California, for the plaintiffs-counter-defendants-third-party-defendants-appellants.

George W. Playdon, Jr., Reinwald, O'Connor, Marrack, Hoskins & Playdon, Honolulu, Hawaii, for defendants-cross-claimants-third-party-plaintiffs-appellees Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., PRI International, Inc.



David W. Proudfoot, Case & Lynch, Honolulu, Hawaii, for defendant-third-party-defendant-appellee Bridon Fibres and Plastics, Ltd.

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### OPINION

T.G. NELSON, Circuit Judge:

### OVERVIEW

Exxon Shipping Co. and Exxon Company U.S.A. (collectively, "Exxon") appeal the district court's judgment following a bench trial in Exxon's admiralty action seeking damages for loss of its tanker, the Exxon *Houston*, and costs of oil spill cleanup and loss of cargo. Exxon maintains that the failure of a Single Point Mooring System ("SPM") manufactured by defendant Sofec and sold by defendants Pacific Resources, Inc. and associated corporations (collectively, "HIRI"<sup>1</sup>) was the actual and proximate cause of its losses. The district court found in Phase One of a bifurcated proceeding that Exxon's negligence superseded any damage caused by the failure of the SPM, and was the sole proximate cause of the *Houston's* stranding. On appeal, Exxon argues that the district court improperly bifurcated the proceedings and that the doctrine of superseding cause has no application to cases in admiralty. We affirm the district court's order.

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<sup>1</sup> We follow the district court's designation of the defendant corporations, which include Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc., as "HIRI."

### FACTS

This case arises from the stranding of the Exxon *Houston* on March 2, 1989, near the Island of Oahu, several hours after it broke away from an SPM owned and operated by defendants HIRI. The *Houston*, a steam propulsion oil tanker weighing over 72,000 dead weight tons, was engaged in delivering oil via two floating hoses into HIRI's submerged pipeline, pursuant to a contract between Exxon and defendant Pacific Resources International, Inc. ("PRII"), when a heavy southern storm (locally termed a Kona storm) caused a break in the chafe chain linking the vessel to the SPM. As the vessel drifted, the two oil hoses broke away from the SPM. Because the hoses were bolted to the ship rather than secured by more readily detachable safety locks, a long (800 feet) length of one hose remained attached to the ship, and interfered with her ability to maneuver.

While the parting of the first hose did not cause a significant threat to the *Houston*, the parting and partial sinking of the second, longer hose, weighed down by a heavy piece of spool torn from the SPM, threatened to foul the ship's propeller. The parting of the second hose at approximately 1728,<sup>2</sup> designated as the "breakout" or "breakaway," is the initiating point in time for events covered in the Phase One trial.

Immediately after the breakout, the Coast Guard contacted the *Houston* to see whether it needed assistance, but because he was advised assistance vessels would not

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<sup>2</sup> The equivalent local time was 5:28 p.m. In keeping with the record, we refer to nautical time in this opinion.



arrive within two hours, Captain Coyne refused the offer, thinking the problem would be resolved within that time. Captain Coyne did not thereafter request assistance from the Coast Guard. During the two hours and forty-one minutes following the breakout, the *Houston's* Captain, Kevin Coyne, took the ship through a series of phases described in some detail in the district court's findings of fact. These phases are summarized in the following paragraphs.

At about 1740, Captain Coyne attempted to anchor, dropping a single anchor which paid out one shot (90 feet) of chain. On the basis of expert testimony, the district court found that Captain Coyne failed to follow standard maritime practice, which would have involved releasing five to six shots of chain to hold the ship under the circumstances. The *Houston* had twelve shots of chain available for each of its two anchors. After this attempt to anchor failed, Captain Coyne made no further efforts to anchor the *Houston* before it stranded, although the district court found there were numerous places en route he could safely have done so.

By 1803, the small assist vessel *Nene* was able, with the assistance of the *Houston*, to get control of the end of the second hose so that it was no longer a threat to the larger ship. Captain Coyne controlled the *Nene's* movements as necessary to coordinate with the *Houston's* movements. Between 1803 and 1830, Captain Coyne maneuvered the *Houston* out to sea and away from shallow water.

Between 1830 and 2009, the time of stranding, the district court found that Captain Coyne made a series of

ill-advised moves. Perhaps most significant was his failure to plot the ship's position on the chart between 1830 and 2004. Rather than plotting fixes of the vessel's position at regular intervals, Captain Coyne relied after 1830 entirely on parallel indexing, a supplemental technique which, according to Exxon's Navigation and Bridge Organization Manual ("Navigation Manual"), "does not relieve the ship's officer of the duty to frequently plot the position of the ship on the chart by means of navigational fixes." Without a fix, Captain Coyne was unable to make effective use of the chart to check for hazards.

Between 1830 and 1947, the crews of the *Houston* and the *Nene* worked to disconnect the second hose from the *Houston*. This was accomplished by 1947. The *Houston's* port crane collapsed in the process, taking the crane operator's seat with it onto the deck. The second mate went below to attend to the crane operator, who was in shock, leaving Captain Coyne alone on the bridge at 1948. Although the Navigational Manual requires that at least two officers be present on the bridge at all times, Captain Coyne did not call upon any of the other available officers to join him until 2000. The district court found that if the bridge had been properly manned, the stranding danger would have been avoided.

Finally, at 1956, Captain Coyne made a disastrous final turn to the right (toward the shore) which resulted in the ship's stranding. Given that the Kona storm was threatening to push the vessel into shore, it is not clear why the Captain chose to turn right instead of continuing to back out safely to sea, or turning to port, away from the coast. Both options were viable. The district court found Captain Coyne's explanations for his decision

unconvincing. Because he had not taken fixes, Captain Coyne apparently was unaware of the ship's position until he ordered Third Mate Spiller to do so at 2004. Third Mate Spiller testified that on seeing the 2004 fix on the chart, Captain Coyne uttered an expletive and immediately ordered an increased speed. Moments later the ship ran aground on a reef near the shore.

### PROCEDURAL HISTORY

In April, 1990, Exxon filed its complaint in admiralty against HIRI and Sofec (the manufacturer of the SPM) for the loss of its ship and cargo, and for oil spill cleanup costs. HIRI filed a third-party complaint against Bridon Fibres and Plastics, Ltd. ("Bridon"), and Griffin Woodhouse, Ltd. ("Griffin").<sup>3</sup> On June 3, 1992, Griffin moved to bifurcate the trial. All defendants joined the motion. The district court granted the motion on July 31, 1992, limiting the first phase of the trial to the issue of causation with respect to the *Houston's* grounding, leaving the issue of causation with respect to the breakout for Phase Two.

After conducting a bench trial in admiralty between February 9, 1993, and March 3, 1993, the district court found that Captain Coyne's (and by imputation, Exxon's) extraordinary negligence was the sole proximate and superseding cause of the *Houston's* grounding. Exxon filed an appeal on June 16, 1993, which was dismissed for lack of a final judgment. Following motions by Bridon and Exxon, the district court entered a final motion precluding all of Exxon's claims for loss of the vessel on

<sup>3</sup> A third company which was dismissed without prejudice.

April 20, 1994. We have jurisdiction over Exxon's subsequent timely appeal pursuant to 28 U.S.C. § 1291, and we affirm the judgment.

### ANALYSIS

#### A. *Applicability of superseding cause in admiralty.*

[1] The district court's conclusions of law are reviewed *de novo*. *Havens v. F/T Polar Mist*, 996 F.2d 215, 217, 1994 A.M.C. 605 (9th Cir. 1993). Exxon argues that the Supreme Court's holding in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), replacing the historical divided damages rule in favor of comparative negligence in admiralty cases, vitiates the use of concepts such as intervening force and superseding cause. In *Reliable Transfer*, the Court rejected the rule whereby damages were divided equally between or among negligent vessels (usually in collision cases) regardless of the degree of fault attributable to each. *Id.* at 397, 411. In concluding, the Court stated that:

[W]hen two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, and that liability for such damages is to be allocated equally only . . . when it is not possible fairly to measure the comparative degree of their fault.

*Id.* at 411.

In the wake of *Reliable Transfer*, the circuits have considered with sometimes conflicting results the issue of



whether superseding cause may still be used to attribute fault in admiralty cases. In *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), on which Exxon relies, the Eleventh Circuit appears to have held the doctrine of superseding cause inapplicable in the maritime context after *Reliable Transfer*. Rejecting appellee's argument that its negligence was not a proximate cause of the accident in question, the *Hercules* court stated:

The doctrines of intervening cause and last clear chance, like those of "major-minor" and "active-passive" negligence, operated in maritime collision cases to ameliorate the . . . so-called "divided damages" rule [rejected by the Supreme Court in *Reliable Transfer*]. . . .

Under a "proportional fault" system, no justification exists for applying the[se] doctrines. . . . Unless it can truly be said that one party's negligence did not in any way contribute to the loss, complete apportionment . . . is the proper method for calculating and awarding damages in maritime cases.

765 F.2d at 1075.

While *Hercules* was understood by the Eighth Circuit to reject the role of superseding cause altogether in maritime cases, *Lone Star Industries, Inc. v. Mays Towing Co., Inc.*, 927 F.2d 1453, 1458 (8th Cir. 1991), it is not entirely clear whether in rejecting intervening cause the Eleventh Circuit meant merely to reject "normal intervening cause" as defined by Restatement (Second) of Torts ("Restatement") section 443, or whether it meant also to reject "superseding cause" as defined by Restatement section

440.<sup>4</sup> Given that the *Hercules* court explicitly rules that appellee's underlying actions were a proximate cause (as

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<sup>4</sup> Section 440 of the Restatement (Second) of Torts defines superseding cause as:

an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.

Comment b adds:

A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm.

Section 441 defines intervening force as:

one which actively operates in producing harm to another after the actor's negligent act or omission has been committed.

Section 443 on "normal intervening force" states that:

[t]he intervention of a force which is a normal consequence of a situation created by the actor's negligent conduct is not a superseding cause of harm. . . .

Section 442 lays out factors for determining whether an intervening force is a superseding cause:

- (a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;
- (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;
- (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;
- (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act;



well as a cause in fact) of the damage, it is plausible that the court would not have ruled out a defense based on superseding cause as the sole proximate cause of the damage.

[2] It is not necessary to resolve here whether the Eleventh Circuit has proscribed the use of superseding cause in admiralty. Several other circuits, most importantly this one, have affirmed the continuing viability of superseding cause in the maritime context. In *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497, 1991 A.M.C. 1217 (9th Cir. 1991), we held that an intervening force supersedes prior negligence where the subsequent actor's negligence was "extraordinary" (defined as "neither normal nor reasonably foreseeable"). Thus, a ship's failure to stand by and offer assistance to the sinking vessel with which it had collided was deemed the sole proximate cause of injury to a rescuing vessel's crewman, even though both of the colliding vessels were causes-in-fact of the collision. *Id.* at 496-97. Accordingly, we held the departing vessel "solely responsible" for the injuries of the seaman aboard the rescuing vessel. *Id.* at 498. See also *Protectus Alpha Navigation Co. v. Northern Pac. Grain Growers*, 767 F.2d 1379, 1384, 1986 A.M.C. 56 (9th Cir. 1985) (indicating in dicta that application of the principle

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(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

Restatement (Second) of Torts §§440-42 (1965).

of superseding cause in a maritime case "would not have been improper."); *Nunley v. M/V Dauntless Colocotronis*, 727 F.2d 455, 466, 1984 A.M.C. 2920 (5th Cir.) (indicating that superseding cause might come into play in admiralty), *cert. denied*, 469 U.S. 832 (1984); *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652, 1994 A.M.C. 512 (5th Cir. 1992) (holding that "the doctrine of superseding negligence in maritime cases . . . retains its vitality"); and *cf. Lone Star*, 927 F.2d at 1458-60 (rejecting the *Hercules* approach and applying superseding cause in a case involving ordinary (as opposed to extraordinary) negligence).

[3] We hereby reaffirm that superseding cause may act to cut off liability for antecedent acts of negligence in admiralty cases where the superseding cause is the result of extraordinary negligence. We therefore hold that the district court did not "disobey" *Reliable Transfer* in employing the concept of superseding cause in this case.

#### B. The decision to bifurcate.

The trial court's decision to bifurcate a trial is reviewed for an abuse of discretion. *Counts v. Burlington N. R.R.*, 952 F.2d 1136, 1139 (9th Cir. 1991). Rule 42 of the Federal Rules of Civil Procedure provides in pertinent part:

[t]he court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, . . . third party claim, or of any separate issue or of any number of claims . . . or issues, always preserving inviolate the right of trial by jury.

[4] Exxon argues that the district court's decision to bifurcate the trial, and to limit Phase One to the issue of causation after the breakout, denied Exxon due process and deprived it of a fair trial by foreclosing it from presenting its case-in-chief. Because it maintains that the issues of causation, from breakout to grounding, are inseverable, Exxon avers that it was unfairly prejudiced by the bifurcation. We do not agree.

[5] The district court assumed at the outset of Phase One that the defendants' negligence was a cause in fact of the grounding. There was thus no need in Phase One for Exxon to establish HIRI's fault in causing the breakout. Rather, Exxon had the burden of proving that the forces set in motion by the breakout were the proximate cause of the grounding. HIRI had the burden of showing by a preponderance of the evidence that Captain Coyne's actions subsequent to the breakout were the sole proximate or superseding cause of the grounding of the vessel, such that the defendant parties were relieved of liability for the *Houston's* loss.<sup>5</sup>

As the district court noted in its order granting the motion to bifurcate, if it did not find Captain Coyne's navigation after the breakout to be the sole proximate or superseding cause of the grounding, it could "still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel." The district court noted, too, that it was "well aware of

<sup>5</sup> We find Exxon's argument that the district court improperly allocated the burdens of proof to be without merit.

the possibility that the issue of causation with respect to the breakout may still require a second phase of trial, perhaps before a jury." After a lengthy bench trial, the district court found that Captain Coyne's extraordinary negligence was the sole proximate cause of the grounding of the *Houston*, obviating any need to make a comparative analysis of fault regarding the loss of the ship. "The principles of comparative negligence are not applicable when damages can be apportioned to separate causes based on evidence in the record." *Protectus Alpha*, 767 F.2d at 1383.

[6] Exxon also argues that the district court erred in holding that the safe berth clause in the contract between HIRI and Exxon imposed a duty of due diligence rather than one of strict liability upon the defendants.<sup>6</sup> Had the district court applied the strict liability standard, Exxon indirectly avers, it could not have bifurcated the trial or upheld HIRI's superseding cause defense. We find it unnecessary to decide here which standard of care is appropriate in this context; even were we to accept Exxon's theory that the HIRI defendants were strictly liable as warrantors of safe berth, such a finding would not render erroneous either the district court's bifurcation of the trial, or its superseding cause analysis.

Where, as here, the district court finds the injured party to be the superseding or *sole* proximate cause of the damage complained of, it cannot recover from a party whose actions or omissions are deemed to be causes in

<sup>6</sup> Exxon does not dispute the district court's finding that the defendants met the duty of due diligence in all respects.



fact, but not legal causes of the damage, regardless of whether that party's liability is premised on negligence or strict liability. See Restatement (Second) of Torts § 440 cmt. b (1965) ("superseding cause relieves the actor of liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm"); and see *In re Related Asbestos Cases*, 543 F.Supp. 1142, 1150 (N.D. Cal. 1982) (holding the defense of superseding cause applicable in cases of strict liability in tort.)

[7] Given the viability of the superseding cause doctrine in cases such as this one, the district court's decision to bifurcate the trial cannot be said to have "severed the unseverable" or to have prejudiced Exxon. Because bifurcation of the trial was expeditious and appropriate in light of the circumstances of this case and did not result in prejudice to Exxon, we hold the district court did not abuse its discretion in choosing to take this approach.

*C. The district court's finding of extraordinary negligence.*

A district court's findings of fact are reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a); *Campbell v. Wood*, 18 F.3d 662, 681 (9th Cir.), cert. denied, 114 S. Ct. 2125 (1994). This standard applies to findings of fact made by admiralty trial courts. *Havens*, 996 F.2d at 217. "[R]eview under the clearly erroneous standard is significantly deferential, requiring a definite and firm conviction that a mistake has been committed." *Concrete Pipe and Prod. of Cal. Inc. v. Construction of Cal., Inc. v. Construction Laborers Pension Trust*, 113 S. Ct. 2264, 2280

(1993) (internal quotations omitted); see also *United States v. Ramos*, 923 F.2d 1346, 1356 (9th Cir. 1991). Special deference is paid to a trial court's credibility findings. *Id.* A district court's findings of negligence, including issues of proximate cause, are reviewed under the clearly erroneous standard. *Vollendorff v. United States*, 951 F.2d 215, 217 (9th Cir. 1991). This standard of review is an exception to the general rule that mixed questions of law and fact are reviewed *de novo*. *Id.* "[D]eterminations of negligence in admiralty cases are findings of fact which will be given application unless clearly erroneous." *Hasbro Industries, Inc. v. M/S St. Constantine*, 705 F.2d 339, 341 (9th Cir.), cert. denied, 464 U.S. 1013, 104 S. Ct. 537 (1983).

Exxon "recognizes the futility of attacking on appeal the district court's finding that Captain Coyne was negligent" because of conflicting expert testimony on that issue, but argues that the district court erred: 1) in finding Captain Coyne's actions to have been extraordinarily negligent; and 2) in finding Captain Coyne's negligence, even if correctly characterized as "gross," to have been the legal cause of the loss.

The district court made detailed findings of fact and conclusions of law after the bench trial. The district court rested its conclusion that Captain Coyne was extraordinarily negligent, and that his negligence was the sole proximate and superseding cause of the ship's grounding, and thus its loss, on its findings that: 1) Exxon had failed to rebut the presumptive admiralty rules of *The Louisiana*, 70 U.S. (3 Wall.) 164 (1865), and *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1873); 2) even aside from these presumptions, Captain Coyne acted with extraordinary



negligence; 3) Captain Coyne acted slowly and deliberately and thus cannot have been said to have acted "in extremis;" and 4) Captain Coyne's actions constituted a superseding cause of the ship's loss under Restatement section 442 and the law of this circuit.

[8] Under the rule of *The Louisiana*, when a moving vessel strikes a charted reef, it is presumed the vessel is at fault. 70 U.S. at 173. The vessel may rebut this presumption by showing by a preponderance of the evidence that the collision was the fault of a stationary object, that the moving vessel acted with reasonable care, or that the collision was an unavoidable accident. *Id.*; see *Weyerhaeuser v. Atropos Island*, 777 F.2d 1344, 1347 (9th Cir. 1985). Because the *Houston* struck a charted reef, and because Exxon failed to meet its rebuttal burden, the district court concluded that Captain Coyne's navigation was negligent, and that this negligence was a proximate cause of the stranding.

[9] *The Pennsylvania* stands for the presumption that when a vessel violates a statutory rule meant to prevent strandings, the violation was a proximate cause of the stranding. 86 U.S. at 136. This presumption can be rebutted by a "clear and convincing showing of no proximate cause." *Trinidad Corp. v. S.S. Keiyoh Maru*, 845 F.2d 818, 825 (9th Cir. 1988). The district court found that Captain Coyne's failure to plot fixes between 1830 and 2004, and his failure to call another officer to be bridge between 1948 and 2000, while he stood there alone, violated 33 C.F.R. § 164.11 and § 164.11(a). Because Exxon failed to sustain its burden under the rule, the district court found these statutory violations were a proximate cause of the stranding.

[10] Exxon responds to these findings in a footnote, wherein it notes, with respect to the *Pennsylvania* rule, but without offering any support, that there is no duty to plot fixes in a time of peril, and, with respect to the *Louisiana* rule, that "the Ninth Circuit has questioned whether presumption of fault applies when the ship strikes a submerged structure." Exxon cites *Grace Line, Inc. v. Todd Shipyards Corp.*, 500 F.2d 361, 366 (9th Cir. 1974), in which we "questioned" but did not decide whether the traditional rule would apply in a case where a ship struck a submerged drydock with a hidden recess. *Id.* In the instant case, the *Houston* struck a charted reef because her captain had not bothered to fix her position. The analogy to *Grace Line* is not apt. Exxon neither rebuts nor offers any compelling reason to ignore the traditional admiralty rules laid out in *The Pennsylvania* and *The Louisiana*.

Quite apart from these rules, the district court found that Captain Coyne "acted negligently, unreasonably and in violation of the maritime industry standards" in a number of instances. The court cited his failure to anchor properly, or to make more than one attempt to anchor; his failure to request assistance from the Coast Guard or other available ships; his failure to back the vessel far enough from shore; and his decision instead to linger unnecessarily in the vicinity of shore, only a half mile or so from the actual grounding line.

[11] Because the district court found, partly on the basis of the Captain's own testimony, that Captain Coyne acted with calm deliberation and without the pressure of imminent peril, it held him to the standard of "such reasonable care and maritime skill as prudent navigators employ for the performance of similar service." *Stevens v.*

*The White City*, 285 U.S. 195, 202 (1932). Exxon acknowledges the Captain remained calm, but argues that because the ship was never out of peril, a more lenient standard should have been adopted. Exxon cites no authority on appeal for this proposition. Because the district court's finding that Captain Coyne had ample time in which to reflect and act between 1830 and the time of grounding is well supported by the record, we find that the district court did not err in holding him to a reasonable standard of care.

Finally, the district court found Captain Coyne's negligence not only to be a proximate or legal cause of the stranding, but to be the sole proximate, and thus the superseding, cause of the ship's loss. On the basis of the testimony of the *Houston's* crew and expert witnesses, the district court found that "[a]lthough the breaking of the mooring chain imperilled the ship, the EXXON *Houston* successfully avoided that peril. By 1830, [she] was heading out to sea and in no further danger of stranding." The court recognized from the start that the *Houston's* reaching a point of safety was not by itself enough to break the chain of events set in place by the breakout. Under Restatement sections 442 and 447, as adopted by this Circuit, *Hunley*, 927 F.2d at 497, the Captain's actions after reaching this point of safety would have to be extraordinarily negligent to be deemed a superseding cause cutting off the liability of the defendants. The district court specifically found Captain Coyne's negligence to be extraordinary with respect to the failure to fix and plot the ship's position after 1830, and the decision to make the final starboard turn. The court also found the fact that

the ship grounded almost three hours after the breakaway "was highly extraordinary rather than normal."

Exxon argues that the court's findings of extraordinary negligence are erroneous, maintaining that none of the Captain's decisions were outside the range of discretion or "so bizarre" as to be unforeseeable, and that "the only command that lead [sic] the tanker to strand was the [right] turn order." Exxon also argues that it was unnecessary for the Captain to plot fixes because he knew his position by parallel indexing and there would have been no room on the chart to plot fixes. Finally, Exxon argues that the Captain's concern about the injured crane operator made him anxious.

Exxon interprets Captain Coyne's actions as dependent intervening, and thus not superseding, forces under Restatement section 441. Essentially, Exxon argues that all of the Captain's actions were reactions to the breakout, and thus cannot be reviewed independently. Exxon relies on *Kinsman Transit Co.*, 338 F.2d 708, 723-26 (2d Cir. 1964), cert. denied, 380 U.S. 944 (1965), for the proposition that failure to foresee danger will not excuse liability. The case is inapposite. *Kinsman* concerned liability for injuries arising from the drifting of an unmanned vessel after it came unmoored. In the portion of the case cited by Exxon, the court deemed it was foreseeable that an unmanned ship turned loose by a faulty mooring device would come to harm or collide with other vessels. *Id.* The *Houston* was not an unmanned vessel, but one fully manned by and



directed by a captain who was capable of getting her to safety before grounding her by his own acts.<sup>7</sup>

[12] The district court's findings that Captain Coyne's failure to take fixes was extraordinarily negligent is supported by the record. All of the expert witnesses, including Exxon's, testified that it was imprudent and contrary to industry standards for Captain Coyne not to plot fixes after 1830. The record does not support Exxon's contention that plotting fixes would have obliterated the chart. Captain Coyne made no such claim; he explained that he did not plot fixes because he felt it was unnecessary to do so. He believed that he could adequately assess the ship's position through parallel indexing. Exxon's assertion that parallel indexing was sufficient is also contradicted by all of the witnesses, including Exxon's. Captain Coyne's sole reliance on parallel indexing was, moreover, contrary to Navigation Safety Regulations, 33 C.F.R. § 164.11, and to Exxon's own Navigation Manual.

[13] The district court's finding that the final starboard turn was extraordinarily negligent is also supported by the record. Captain Coyne stated that he wanted to get away from shore, but the turn right took him toward shore. As for his concern with the hose and

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<sup>7</sup> *Kinsman* rejects the doctrine of last clear chance under which the trial court had excused the moorers (and the shipowner) from liability. 338 F.2d at 719. While Exxon has analogized superseding cause doctrine to last clear chance, that argument fails, and *Kinsman* does not rescue it. HIRI was not absolved of fault because Exxon had the "last clear chance" to avoid danger, but because the district court found that Exxon's independent and extraordinarily negligent actions were the sole legal cause of the stranding.

danger of collision with the *Nene*, it is undisputed that Captain Coyne made no effort to ascertain the position of the *Nene*. The district court properly rejected the Captain's argument that he could not continue to back up because of his concern for Denton, the injured crane operator, as the man was in fact not seriously injured, no one called upon the Coast Guard or other available ships for assistance in a supposed medical emergency, and the Captain's own testimony that his concerns for Denton did not in fact cause him to do anything he would not otherwise have done.

[14] In sum, the district court found that Captain Coyne had ample time, as well as opportunity and available manpower, to take precautions which would have eliminated the risk of grounding, and that his failure to do so amounted to extraordinary negligence, superseding any negligence of the defendants with regard to the breakout or provision of safe berth after the breakout. Because the district court's findings are well supported by the record, we hold they are not clearly erroneous.

### CONCLUSION

We hold the district court did not err in finding Captain Coyne's extraordinary negligence to be the sole proximate and superseding cause of the damage to the *Houston*, and we

AFFIRM.

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## **RESTATEMENT OF QUESTIONS PRESENTED**

I. Whether federal admiralty law should apply the same principles of proximate causation for maritime torts that have been developed by the courts in the common law of torts, including principles of comparative fault and superseding cause?

II. Whether federal admiralty law should apply the same principles of causation in cases involving maritime contract claims, framed in terms of "foreseeability," as the courts apply in the common law of contracts?

## LIST OF PARTIES

The petitioners are Exxon Company, U.S.A. and Exxon Shipping Company. The respondents are Sofec, Inc.; Pacific Resources, Inc.; Hawaiian Independent Refinery, Inc.; PRI Marine, Inc.; and PRI International, Inc. The third-party respondents are Bridon Fibres and Plastics, Ltd.; and Griffin Woodhouse, Ltd.

The following statement is made pursuant to Supreme Court Rule 29.6 for each of the parties represented on the brief:

- (1) Sofec, Inc. has no nonwholly owned subsidiaries. The parent company of Sofec, Inc. is FMC Corporation.
- (2) Bridon Fibres and Plastics, Ltd., which has since been renamed Bridon Fibres Ltd., has no nonwholly-owned subsidiaries. The parent company is Bridon Plc.
- (3) Griffin Woodhouse, Ltd. has no parent companies and no nonwholly owned subsidiaries.

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IN THE  
Supreme Court of the United States

OCTOBER TERM, 1995

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EXXON COMPANY, U.S.A.;  
EXXON SHIPPING COMPANY,

*Petitioners,*

v.

SOFEC, INC.; PACIFIC RESOURCES, INC.;  
HAWAIIAN INDEPENDENT REFINERY, INC.;  
PRI MARINE, INC.; PRI INTERNATIONAL, INC.,

*Respondents,*

v.

GRIFFIN WOODHOUSE, LTD.;  
BRIDON FIBRES AND PLASTICS, LTD.,

*Third-Party Respondents.*

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On Writ of Certiorari to the  
United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THIRD-PARTY RESPONDENTS AND  
FOR RESPONDENT SOFEC, INC.

---

STATEMENT OF THE CASE

*Introduction*

The central factual issue in this case concerns proximate causation. In particular, the trial here properly focused on determining the proximate cause (or causes) of the stranding of the EXXON HOUSTON, an oil tanker owned and operated by petitioners. Petitioners' statement of the case portrays the events of March 2, 1989 as a continuous jumble of occurrences unbroken at any point and unaffected by any superseding causal

forces such as the subsequent extraordinary negligence of Captain Coyne and the crew. Viewing the case from this perspective, petitioners suggest that the trial court's concentration on the dispositive issue of proximate cause was ill conceived. Petitioners' strategic portrayal is not uncommon in tort cases involving multiple parties, but it badly misconceives the important role of the doctrine of proximate cause in clarifying the complex factual skeins that often must be sorted out in adjudicating such cases.

The late Judge Fong conducted a three-week bench trial in this case, and for purposes of the Court's review, the record here is fully set forth in the factual findings made by the District Court and upheld on review by the Court of Appeals.<sup>1</sup> Judge Fong also made a crucial ruling prior to trial, on respondents' motion to bifurcate the proceedings. Essentially, he determined that two significant sets of events occurred in this case, which took place not contemporaneously but successively: first, there were various factors that led to the initial breakout of the vessel from its mooring; second, there were a number of other events that might also be found to have led to her ultimate stranding.

Judge Fong determined that judicial efficiency and the resources of all the parties would be most usefully concentrated, as an initial matter, upon the potentially dispositive issue of proximate cause. He therefore granted respondents' motion for bifurcation. J.A. 58-75. In Phase One of the trial, he directed the parties to focus their attention on determining whether the breakout and/or other events were the proximate cause (or causes) of the vessel's stranding. J.A. 71-74, 103-04. Phase Two of the trial, if necessary, would be devoted to allocating responsibility for the events that caused

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<sup>1</sup> In a footnote to their brief, petitioners appear to disparage the late Judge Fong as unfamiliar with admiralty law and thus seeking help from his law clerk. See Petitioners' Brief on the Merits ("Pet. Br.") 4 n.4. Judge Fong, however, was a respected jurist who served for seven years as the Chief Judge of the District Court for the District of Hawaii, and during his thirteen years of service on the bench he presided in many admiralty cases. Any aspersions upon his capabilities are inappropriate and wholly unwarranted.

the breakout and to assessing damages. J.A. 73-74. Detailed factual discovery and trial preparation on these latter points might be averted, in the court's view, if it first were to determine the proximate cause (or causes) of her stranding. J.A. 71-72. Much of petitioners' ire is aimed at the bifurcation order, which they believe led the court "to try the case upside-down and backwards." Pet. Br. 4.

In the end, Judge Fong found as a factual matter that after the vessel broke loose from its mooring, it reached a position of safety more than 90 minutes before it was stranded. He also found that the acts and omissions of Captain Coyne and the crew, which occurred after the vessel had reached a position of safety, constituted extraordinary negligence. That conduct, rather than the original breakout of the vessel, was determined to have proximately caused its stranding. The legal issues must be examined against this factual backdrop.

### *Factual Background*

This is a traditional tort case, based upon relationships that were defined in part by the terms of a contract. Petitioners entered into a contract to deliver crude oil "by vessel into Hawaiian Independent Refinery, Ewa Beach, Hawaii, via offshore single point system." J.A. 143. Among the terms of various related agreements between the parties was a warranty of "safe berth," which required the terminal to "provide a safe berth to which vessels may proceed to or depart from, and where the vessel can always lie safely afloat." J.A. 142-43. On March 1, 1989, pursuant to the terms of this contract, the EXXON HOUSTON arrived at the single point mooring at Barbers Point, Oahu, was moored there, and proceeded to discharge oil into a submerged pipeline. J.A. 144-46.

A mooring assembly, which included a chafe chain and mooring hawser, attached the bow of the EXXON HOUSTON to the mooring. Oil was discharged from the vessel to the submerged pipeline through two floating hoses, which were secured to the vessel by twelve bolts and several restraining lines. The mooring assembly held the vessel in place and allowed the hoses to float freely without any tension. J.A. 146.

Captain Coyne, the master of the EXXON HOUSTON, was acting within the course and scope of his employment at all times leading up to the stranding. Through past experience,



Captain Coyne was familiar with the mooring at Barbers Point and with maritime conditions in the vicinity. J.A. 144.

On March 2, 1989, at 1715,<sup>2</sup> stormy conditions at the mooring caused a link in the chafe chain to part. The vessel began to drift away from the mooring, which put the hoses under tension. By 1728, both hoses had parted, causing some oil to discharge into the water. One of the two lengths of hose remained connected to the vessel, raising concern that it could foul the propeller if the ship were to move forward. J.A. 146-47. The trial court specifically designated 1728 as the point of the "breakout" of the vessel from its mooring. At trial, the court focused the parties' efforts on determining whether the breakout or events subsequent to the breakout constituted the proximate cause (or causes) of the eventual stranding.

At 1730, the U.S. Coast Guard's rescue service made a radio call to Captain Coyne, who declined their offer of help, for he believed the situation would be resolved before assistance vessels could arrive. J.A. 148.<sup>3</sup> At 1740, Captain Coyne tried to anchor the vessel, but the effort foundered when he failed to follow standard practice by releasing enough of the anchor chain to hold the ship in water approximately sixty feet deep, though ample length of chain was available to do so. J.A. 148-49. At 1747, the anchor was raised. Captain Coyne never again sought to drop anchor, despite the fact that over the course of more than two hours between this time and the eventual stranding he had many opportunities to anchor the vessel safely. J.A. 150.

An assist tug was available at the mooring site to provide assistance after the breakout occurred. Although this boat, the NENE, was not able to tow the EXXON HOUSTON to safety, by 1803 it had attached a line that gave it control of the end of the remaining hose and enabled it to secure the hose away from the EXXON HOUSTON's propeller. Thereafter, Captain Coyne

<sup>2</sup> All of the times stated here are Honolulu local time, given in nautical format. Thus, for example, 1715 is 5:15 p.m. Honolulu time.

<sup>3</sup> The trial court found that individual vessels had broken loose from the same mooring on two prior occasions, each of which concluded without incident. J.A. 148.

ordered the movements of the NENE as needed to coordinate with the movements of the EXXON HOUSTON. J.A. 147, 150. The EXXON HOUSTON backed out to sea between 1803 and 1830, on a slow course that took it away from shallow water. Its position was regularly and accurately plotted on the vessel's navigational chart from 1740 to 1830. J.A. 150-51. Between 1830 and 1947, the remaining hose was disconnected from the EXXON HOUSTON, and was pulled clear at 1947. J.A. 156.

At 1831, Captain Coyne changed course, a decision that "was not caused by any necessity or emergency and there was no reason why the vessel could not have continued to back out to sea after 1830." J.A. 151. At this point, the ship was slightly more than a mile from the shore, and about one-half mile from the grounding line in shallow water near the shore. From 1830 to 1956, the EXXON HOUSTON remained approximately the same distance from the shore, though at any time Captain Coyne could have backed the vessel "to any distance offshore he wanted" without significant risk, a course that would have been much safer than remaining near the shore while the winds tended to push the ship ashore. J.A. 151.

Between 1830 and 2004, the position of the EXXON HOUSTON was not plotted on any chart, which violated federal law, though proper charts for this purpose were easily accessible on the bridge of the vessel. J.A. 152, 168-69. "A prudent mariner would have fixed and plotted his vessel's position at least every 15 to 20 minutes" in this situation, especially in view of the ship's proximity to the shore and the difficulty of estimating its position in the dark. J.A. 152. Captain Coyne had personnel available to plot the ship's position, but failed to make use of them. Instead, from 1830 to 1956 he elected to navigate by the method of "parallel indexing," which is designed simply to keep the ship a constant distance from the shore. J.A. 153. "Parallel indexing is not a substitute for fixing the position of the vessel. Navigation by parallel indexing without plotted fixes is inherently dangerous and a violation of industry standards." J.A. 153. "Without a fix, Captain Coyne was not able to check the chart for hazards." J.A. 155. Captain Coyne testified inconsistently on these matters between his deposition and the trial, and his testimony that he knew the position of the vessel at all times was

contradicted by one of the ship's officers. J.A. 154-55. In sum, at this juncture "Captain Coyne inexplicably chose to loiter in a dangerous area without fixing his position." J.A. 175-76.

A member of the crew appeared to have been injured at approximately 1944, though the injury was not a serious one. J.A. 156, 233. Captain Coyne sent an officer to evaluate the crew member's condition, but did not order any of the other available officers to replace him, which left Captain Coyne as the only officer on the bridge from 1948 to 2000, with no other officer present to fix the vessel's position. J.A. 156. This situation also violated federal law. J.A. 156-57, 168-69. "If the bridge had been properly manned, the danger of stranding would have been avoided." J.A. 157.

At 1956, Captain Coyne commenced the final turn that culminated in the stranding of the vessel, which the court found was "not a foreseeable consequence of the breakout." J.A. 175. He "did not look at the navigational chart before commencing the final turn," even though at the time he "did not know the ship's position." J.A. 157. Given "the prevailing directions of the wind and sea" and the other conditions, "a prudent mariner would not have attempted" this turn, which "was grossly negligent, regardless of whether or not it could have been made successfully." J.A. 157-58. An officer of the ship happened to arrive on the bridge at 2000. Captain Coyne was in doubt as to the ship's position at that time and ordered the officer to plot a fix of its position, which was done at 2004. J.A. 158.

When Captain Coyne saw the 2004 fix on the navigational chart, he exclaimed, "Oh shit!" J.A. 158. He immediately ordered the vessel's speed to be increased, but moments later the EXXON HOUSTON stranded on a reef that was clearly charted on the ship's navigational chart. J.A. 158-59. "Over two and one-half hours elapsed between the breakout and the stranding. During that period, Captain Coyne and his crew had ample time to consider the situation calmly and deliberately." J.A. 159.<sup>4</sup> "In short, Captain Coyne recklessly ignored all

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<sup>4</sup> At trial, petitioners contended that the final turn failed "only because of a large current that pushed the ship onto the reef" and that Captain Coyne should have been warned about this supposed current. J.A. 159. The court rejected this explanation because petitioners

pertinent information that was available to him." J.A. 160.

### *The Bifurcation Order*

Petitioners brought suit against respondents, alleging claims for breach of contract warranties, negligence, and products liability. Respondent Sofec, Inc. manufactured the single point mooring system, which was owned and operated by the other respondents. Respondent HIRI subsequently filed a third-party complaint against the third-party respondents here, who manufactured and distributed components of the chafe chain used in the single point mooring system.

The principal portion of the damages claimed by petitioners stemmed from the grounding of the EXXON HOUSTON herself, as the damages incurred from the oil cleanup were relatively minor. J.A. 71. The central difficulty in structuring the trial proceedings in this case was to determine the issue of causation among the multiple parties with respect to the harm that the vessel suffered when it was stranded. Respondents and the third-party respondents vigorously disputed among themselves the cause of the initial breakout of the vessel from its mooring. J.A. 63. Petitioners and all of the various respondents also disputed the actual and proximate cause of the vessel's stranding. J.A. 62-69. Observing that petitioners bore "the burden of proving that the breakout of the vessel from her mooring was the proximate cause of the grounding," J.A. 66, the trial court found itself unable to resolve these issues on summary judgment because the critical factual issues were legitimately in dispute, J.A. 69, 71.

More than two years after the complaint was filed, the trial court sought to simplify the imminent trial proceedings by granting respondents' motion to bifurcate the issue of causation

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failed to show that their post-hoc studies of the currents in the area could have been reduced to a usable format and, more important, because petitioners failed to show that Captain Coyne would have referred to such data had it been available. Instead, the court found that Captain Coyne's decision to turn "was made in haste without due consideration of several other pieces of information which should have caused him to reject the turn," such as the navigational charts, fixed plots that should have been taken of the vessel's position, or consultations with his other officers. J.A. 160.



as between the breakout and the stranding of the vessel. J.A. 71-74. The trial court noted its authority to exercise "broad discretion to order separate trials pursuant to Rule 42(b) of the Federal Rules of Civil Procedure when a separate trial will further convenience, avoid prejudice or be conducive to expedition and economy." J.A. 72 (quotation omitted).

The court considered those factors and determined that they supported bifurcation on the causation issue. It acknowledged respondents' observations that "bifurcation could obviate the need for extensive discovery, trial preparation, and weeks of trial if the court first determines the cause or comparative causes of the grounding, excluding the cause of the breakout," which would involve complicated matters of proof. J.A. 71. The court also noted that Phase One of the trial would address 80% of petitioners' damage claims, which supported respondents' view that "a separate trial offers the probability of settlement after the conclusion of the first phase." J.A. 72. Moreover, the court concluded that if it were to determine "that the navigation of the EXXON HOUSTON was the proximate cause of its grounding, then it would be unnecessary for the court to resolve the issue of 'comparative fault'" or assess damages. J.A. 72 (citation omitted).

The court explained, however, that the ascertainment of comparative fault would be very much at issue in Phase One of the trial if the facts supported this resolution: "On the other hand, if the court does not find that the navigation of the vessel was the superseding cause of the grounding, the court can still determine in the first phase of a bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation of the vessel." J.A. 73. Finally, the court weighed and resolved the competing considerations that were raised by the motion to bifurcate:

The court is well aware of the possibility that the issue of causation with respect to the breakout may still require a second phase of trial, perhaps before a jury. The court, however, is in the best position to determine whether bifurcation *in this case* promotes judicial economy. The court finds that it does.

J.A. 74 (emphasis in original).<sup>5</sup> Judge Fong thus ordered the parties initially to try "the issue of causation with respect to the EXXON HOUSTON's grounding, but not including the issue of causation with respect to the breakout itself." J.A. 74.

### *The Trial Court Judgment*

The purposes that the trial court believed would be served by the bifurcation order were vindicated by the trial proceedings themselves. The causation issues addressed in Phase One of the trial alone required three weeks of courtroom time. After a bench trial of those issues, the court entered judgment for respondents, concluding that they "are not legally responsible for the stranding of the EXXON HOUSTON." J.A. 175. The court based this conclusion on the findings of fact as related above, and on the following determinations.

First, the court noted the Court's venerable holding in *THE LOUISIANA*, 70 U.S. (3 Wall.) 164 (1865), that when a moving vessel strikes a charted reef, it is presumed that the vessel is at fault. *Id.* This presumption of fault suffices to make out a *prima facie* case of negligence against the moving vessel. The presumption is "universally described as strong, and as one that places a heavy burden on the moving ship to overcome." J.A. 167 (quotations omitted). It can be overcome only by proving, for instance, that the vessel acted with reasonable care or that the stranding was inevitable. Yet the trial court found that petitioners simply failed to carry their burden of proof on either point. It thus concluded that petitioners were negligent and that their negligence was a proximate cause of the stranding. J.A. 167.

Second, the court recognized that "admiralty law further presumes that when a vessel violates a statutory rule meant to prevent stranding, the violation was a proximate cause of the stranding." J.A. 168; see *THE PENNSYLVANIA*, 86 U.S. (19 Wall.) 125 (1873). Captain Coyne was found to have violated mandatory federal directives both by failing to have the vessel's

<sup>5</sup> At that juncture, a jury trial might have been necessary on various contract claims that Sofec had asserted against HIRI, which did not fall within federal admiralty jurisdiction. Sofec has since dismissed those claims, leaving no matters that would require resolution by a jury.



position plotted on a navigational chart between 1830 and 2004 and by manning the bridge alone between 1948 and 2000. See 33 C.F.R. § 164.11(a) & (c) (1995). Because petitioners again failed to rebut the presumption of negligence imposed by this rule, the court found that petitioners' violations were a proximate cause of the stranding of the vessel. J.A. 169.

Third, the court went on to consider in more detail whether Captain Coyne's conduct was negligent without regard to the application of the foregoing rules. It found that he acted "negligently, unreasonably and in violation of the maritime industry standards" in numerous ways: (1) by not deploying sufficient chain to anchor the ship at 1747; (2) by not requesting assistance from the Coast Guard or others; (3) by not attempting to anchor the ship again after 1747; (4) by not continuing to back the ship after 1830 until it reached a safe distance from the shore; (5) by choosing to linger in the vicinity of the shore, only about one-half mile from the actual grounding line. J.A. 170-71. In addition, Captain Coyne's failure to plot fixes of the vessel's position between 1830 and 2004, which would have avoided any danger of stranding, "was grossly and extraordinarily negligent and in violation of the maritime industry standards." J.A. 171.

Captain Coyne's final turn, which led immediately to the grounding of the vessel, was found to be "grossly and extraordinarily negligent and in violation of the maritime industry standards because he commenced it without knowing the vessel's position." J.A. 171. The decision to turn the ship toward the coast was found to have been made "independently of the breakout," and this decision and the attempt to make the turn were each found to be "not a foreseeable consequence of the breakout." J.A. 175. Once again, the trial court found that Captain Coyne could have avoided any danger of stranding by simply backing out to sea or turning the other way. J.A. 171.

Fourth, and of extreme significance here, the court made an independently dispositive determination that the causal chain between the initial breakout and the ultimate stranding was broken during the intervening period. In particular, the court found that by 1830, the EXXON HOUSTON had reached a position of safety, which vitiated the causal forces that had previously operated on the vessel after it came loose from its

mooring.<sup>6</sup> "The EXXON HOUSTON had reached a safe position and only the gross negligence of its master put it into further danger." J.A. 174. The court later reiterated the same point: "By 1830, the Exxon Houston was heading out to sea and in no further danger of stranding. Only the grossly negligent actions of its master endangered the vessel further." J.A. 175.<sup>7</sup>

For all of these reasons, the court concluded that petitioners did not carry their burden of proving that the initial breakout proximately caused the stranding of the vessel. J.A. 162, 172-76. It based this conclusion on careful consideration of the factors laid out in section 442 of the *Restatement (Second) of Torts*, which define when "an intervening force is a superseding cause of harm to another." J.A. 172-73. The court found, in particular, that many features of Captain Coyne's conduct were "highly extraordinary" and "grossly negligent," though they resulted from "voluntary, unforced" decisions, J.A. 174-75, made not in any extreme crisis, but "calmly, deliberately and without the pressure of an imminent peril," J.A. 170. In the end, his actions were judged to be "the sole proximate cause of the stranding of the EXXON HOUSTON." J.A. 173.

Judge Fong summed up his determinations as follows: "Captain Coyne inexplicably chose to loiter in a dangerous area without fixing his position. Then, while overly concerned by an injury to a crew member, he drove the ship onto a charted reef. *It would be manifestly unjust to hold anyone legally responsible for the consequences of these acts other than Captain Coyne and his employer, Exxon.*" J.A. 175-76 (emphasis added).

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<sup>6</sup> The court had confronted the same potentially dispositive issue on motion for summary judgment, but was unable to resolve it in that posture, for whether the vessel had reached a position of safety, and whether Captain Coyne had been negligent, were both disputed facts that could only be resolved after trial. J.A. 68-71.

<sup>7</sup> The court also found that petitioners had failed to establish any post-breakout breaches of the "safe berth" clause or warranty contained in their contract with respondents HIRI, who owned and operated the single point mooring system. J.A. 162-66.

### *The Court of Appeals Decision*

The Court of Appeals unanimously affirmed. It began its analysis by focusing on the issue of proximate cause, including the subsidiary principle of superseding cause, and discerned some confusion among the courts of appeals on the continued applicability of these concepts under the comparative fault rule adopted in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).<sup>8</sup> After considering the case law, the court reaffirmed its previous ruling that "superseding cause may act to cut off liability for antecedent acts of negligence in admiralty cases where the superseding cause is the result of extraordinary negligence. We therefore hold that the district court did not 'disobey' *Reliable Transfer* in employing the doctrine of superseding cause in this case." J.A. 223.

The Court of Appeals then easily dispatched petitioners' claim that the District Court had improperly bifurcated the proceedings, noting that trial courts enjoy broad discretion under Rule 42(b), and concluding that Judge Fong did not abuse his discretion. Legally, the bifurcation was unexceptionable, for the District Court had correctly determined that if it found "the injured party to be the superseding or sole proximate cause of the damage complained of, it cannot recover from a party whose actions or omissions are deemed to be causes in fact, but not legal causes of the damage, regardless of whether that party's liability is premised on negligence or strict liability." J.A. 225-26 (emphasis in original). Moreover, the court soundly exercised its discretion, for bifurcation of the trial was "expeditious and appropriate" and did not prejudice Exxon. J.A. 226.

Finally, the Court of Appeals turned to the trial court's findings that Captain Coyne had acted "with extraordinary

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<sup>8</sup> In particular, the Ninth Circuit found inconsistency between the Eleventh Circuit's decision in *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985), which apparently is the only decision to reject the doctrine of superseding cause, and later decisions by the Fifth, Eighth, and Ninth Circuits, which hold that the doctrine of proximate cause, including the subsidiary principle of superseding cause, retains its full vitality in maritime tort cases. See J.A. 219-23.

negligence" and that those actions "constituted a superseding cause of the ship's loss." J.A. 227-28. On each point, the Court of Appeals approved the trial court's determinations, relying heavily on its factual findings, which were found to be "well supported by the record" and thus were upheld in their entirety. J.A. 233; see generally J.A. 226-33.

### SUMMARY OF ARGUMENT

Admiralty courts should apply the same principles of proximate causation for maritime torts that courts apply in the common law of torts. The doctrine of proximate cause has been elaborately developed and refined over centuries of adjudication. These foundational principles for ascertaining legal responsibility for wrongs done to another are embodied in the settled case law as well as in the leading authorities on tort law. No sound reasons have been advanced for departing from these well-settled principles in cases involving maritime torts.

The established doctrine of proximate cause in the law of torts includes the principle of superseding cause. Indeed, this principle is a bedrock tenet of causation analysis in circumstances where different causal forces operate successively rather than concomitantly. In particular, where a court determines that a subsequent causal force is an extraordinary intervening event that is not a normal consequence of previous causal forces, the accepted principle of superseding cause holds that the subsequent causal force constitutes the proximate cause of any harm that may have occurred. Any other approach would represent a significant departure from the established doctrine of "proximate" cause.

These tort-law concepts are wholly consistent with principles of comparative fault. Most modern regimes of tort law have adopted comparative negligence as the basic rule for allocating liability, and yet they continue faithfully to apply the principle of superseding cause in their analysis of proximate cause both in negligence cases and in products liability cases. For these reasons, the principle of superseding cause is consistent with this Court's decision in *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975), which adopted the rule of comparative fault in maritime tort cases. The plain consistency of traditional causation principles with the



comparative fault rule is shown by the Court's decision in *Union Oil Co. of Cal. v. THE SAN JACINTO*, 409 U.S. 140 (1972), which must be overruled for petitioners to prevail.

The accepted doctrine of proximate causation reflects the straightforward and practical approach favored in federal admiralty law. This is primarily so because this doctrine can aid in streamlining complex causal chains of events that would multiply the practical difficulties of trying maritime tort cases involving multiple claims and multiple parties. Consistency between the common law of torts and federal admiralty law governing maritime torts is also important to discourage forum shopping in those cases where federal admiralty jurisdiction may be uncertain or disputed.

In addition, the Court has stressed the need to maintain consistency between American admiralty law and the legal principles applied by other leading maritime nations. This is important to discourage transoceanic forum shopping, which is detrimental to maritime commerce and to the just and orderly resolution of civil disputes that arise with regularity in international waters. Consistent treatment of maritime tort claims between these bodies of law is best facilitated by adhering to settled principles of proximate causation, as exemplified by a strikingly similar British decision, *S.S. SINGLETON ABBEY v. S.S. PALUDINA* [1927] App. Cas. 16.

The lower courts correctly applied the doctrine of proximate causation here. The trial court made two pivotal factual findings that are dispositive of petitioners' claims. First, the trial court found that after the vessel broke loose from its mooring, it ultimately reached a position of safety, at which point the causal forces stemming from the breakout were no longer any substantial factor in its subsequent movements. The circumstances obtaining at that juncture allowed calm deliberation and decisionmaking as to where to guide the vessel thenceforth. Second, the trial court found that Captain Coyne committed "extraordinary" negligence in his subsequent handling of the vessel, and that this extraordinary negligence was the sole proximate cause of her stranding. These factual findings are critical to proper disposition of the claims advanced in this case, and stand in sharp contrast to the skewed account of events conjured up in petitioners' brief.

Petitioners have also recast their tort claims, based on the same underlying events, as contract claims premised on express and implied warranties contained in their contract to deliver crude oil. For many of the reasons already stated, this Court should hold that the same causation principles apply to maritime contract claims, framed in terms of "foreseeability," as the courts apply in the common law of contracts. The foreseeability doctrine tends to reflect tort-like principles of proximate cause, but is more limited in scope. Application of this doctrine in this case affords no relief to petitioners, but is fully consistent with traditional concerns of admiralty law.

Finally, the real object of petitioners' recriminations is the District Court's ruling that bifurcated the trial in order to focus judicial resources on the dispositive issue of proximate causation. Petitioners repeatedly assert that the trial court's bifurcation order deprived them of due process of law. Yet they did not frame this issue as one of their questions presented, and therefore they cannot seek reversal on this ground.

Moreover, any such claim is frivolous. It is standard procedure in tort cases involving multiple parties to conserve the resources of the court and litigants alike by trying one or more potentially dispositive issues in the first instance, and postponing resolution of other issues, if necessary at all, until a later stage. In admiralty cases, as in other cases, trial courts should enjoy broad discretion to devise what they judge to be orderly and efficient processes for determining the factual and legal issues. The results of this trial fully vindicate the purposes that the late Judge Fong concluded would be served by bifurcation here.

## ARGUMENT

### I. ADMIRALTY COURTS SHOULD APPLY THE SAME PRINCIPLES OF PROXIMATE CAUSE FOR MARITIME TORTS AS THE COURTS APPLY IN THE COMMON LAW OF TORTS.

The essence of the decisions below, and of our position before this Court, is that maritime torts are no different from land-based torts in terms of the legal principles that should govern such basic issues as breach of duty, causation, and



damages. In particular, the doctrine of proximate cause, which courts have refined over many decades of jurisprudential development, should apply to maritime torts for the same reasons of fairness and efficiency that have been found to justify its application in all other kinds of tort cases. This general principle of consistency between federal admiralty law and the common law also discourages forum shopping in cases where federal admiralty jurisdiction is uncertain or disputed.

#### A. The Doctrine of Proximate Cause in Tort Law Includes the Principle of Superseding Cause

The doctrine of proximate cause is firmly established in the common law of torts. It is a critical tool for avoiding endless squabbles about how far along the truly infinite chain of causal forces courts should extend their inquiries in order to fix legal responsibility for harm suffered by complaining parties. See, e.g., W. Page Keeton, *Prosser and Keeton on the Law of Torts* § 44, at 302 (5th ed. 1984) ("In the effort to hold the defendant's liability within some reasonable bounds, the courts have been compelled, out of sheer necessity and in default of anything better, to fall back upon" the doctrine of proximate cause, including "intervening cause.").

The principal features of proximate causation are set forth in the *Restatement (Second) of Torts*, and were correctly relied upon by the courts below. See J.A. 172-76, 221 n.4, 230-33. For a party's conduct to constitute the legal cause of any harm, that conduct must be "a substantial factor in bringing about the harm" and must not be subject to any rule of law that relieves that party "from liability because of the manner in which his negligence has resulted in the harm." *Restatement (Second) of Torts* § 431 (1965). One of the rules that relieves a party from liability for its negligence is the doctrine of superseding cause. A "superseding cause" is defined as any "intervening force" that "actively operates in producing harm" to the complaining party "after the actor's negligent act or omission has been committed," at least where certain other considerations are present. *Id.* §§ 440 & 441.

The considerations that suffice to transform an intervening force into a superseding cause, which relieves the defendant of liability, are set out in the *Restatement*, as follows:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence;

(b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation;

(c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation;

(d) the fact that the operation of the intervening force is due to a third person's act or his failure to act;

(e) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him;

(f) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.

*Id.* at § 442.<sup>9</sup> Consistent with this itemization of pertinent considerations, courts continue to apply the principle of superseding cause in making determinations of liability for all manner of tort claims.<sup>10</sup>

Dissenting from the widespread acceptance of these principles, petitioners' amicus quotes a passage from Dean Prosser that, taken out of context, seems critical of this doctrine: "It must be conceded that 'intervening cause' is a highly unsatisfactory term, since we are dealing with problems of responsibility, and not physics." See *Maritime Law*

<sup>9</sup> As will be discussed in more detail, see Section II, *infra*, the trial court painstakingly applied the factors set forth in section 442 of the *Restatement* in order to reach a correct determination of liability in this case. See J.A. 172-76.

<sup>10</sup> See, e.g., *Peckham v. Continental Casualty Ins. Co.*, 895 F.2d 830, 838 (1st Cir. 1990); *Watters v. TSR, Inc.*, 904 F.2d 378, 383 (6th Cir. 1990); *Lone Star Indus., Inc. v. Mays Towing Co.*, 927 F.2d 1453, 1459-60 (8th Cir. 1991) (maritime tort); *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991) (maritime tort).

Association of the United States as *Amicus Curiae* in Support of Petitioners ("MLA Br.") 12 n.7. The complete passage, however, shows that this supposed criticism is merely linguistic, not conceptual, for it continues:

[The term "intervening cause"] is used in default of a better, because it is useful in dealing with the type of case where a new and independent cause acts upon a situation once created by the defendant. In the most common usage it is meant to be understood in a very general sense that distinguishes intervening causes from concurring causes of either natural or human origin, which come into active operation at a later time to change a situation resulting from the defendant's conduct.

*Prosser and Keeton, supra*, § 44, at 302. The broader context of Dean Prosser's discussion demonstrates even more fully his agreement with the definitive position of the *Restatement* that the principles of superseding or intervening cause represent an established doctrine of tort law that is useful in settling legal responsibility for the harms that occur in certain kinds of factual situations. *See id.* at 301-19.

#### **B. The Doctrine of Proximate Cause Is Consistent with Principles of Comparative Fault**

The gist of petitioners' dissatisfaction with the law as framed by the lower courts in this case is their contention that the legal principle of superseding cause is wholly inconsistent with comparative fault. *See Pet. Br.* 23-29. Yet because this principle is an accepted feature in legal analysis of proximate causation, and since that analysis occurs routinely in tort cases governed by modern principles of comparative negligence, petitioners' contention is plainly wrong.<sup>11</sup>

<sup>11</sup> In the court below, petitioners sought to analogize the doctrine of superseding cause to the now-discredited doctrine of "last clear chance," but this distortion was recognized plainly as such and roundly rejected. *See note 12, infra*. In this Court, they have shifted ground and now seek to analogize superseding cause to the doctrine of contributory negligence, *see Pet. Br.* 21 & 32, which again misconceives basic principles of tort law. *Compare, e.g.,*

The principle of imposing liability in proportion to the amount of harm caused by each party's conduct was not favored in an earlier age where the trial of cases was marked by simpler legal standards and methods of proof were perhaps more primitive and less exacting. In recent decades, however, the common law has generally embraced comparative fault as the accepted rule in apportioning liability for tortious conduct. *See Prosser and Keeton, supra*, § 67, at 479 ("comparative fault apportionment of damages is veritably sweeping the land"). With the adoption of comparative fault, many of the doctrines that had grown up under the prior tort-law regime have been rendered obsolete. The harsh corrective rule of contributory negligence as a complete bar to recovery, for example, along with such counter-correctives as "last clear chance," have not been sustained in the new regime of modern tort law based on principles of comparative fault. *See id.* at 477-78.<sup>12</sup>

At the same time these developments have occurred, however, courts have not diminished their allegiance to the traditional principles of causation analysis, including proximate cause. The doctrine of proximate cause remains critical in fixing legal responsibility for harm even under a tort-law regime that has embraced the apportionment of damages among

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*Restatement (Second) of Torts, supra*, ch. 16 (discussing causation, including superseding cause) *with id.* ch. 17 (discussing contributory negligence).

<sup>12</sup> In the decision below, the Ninth Circuit correctly distinguished the doctrine of superseding cause, which remains useful and valid in determining proximate cause, from "last clear chance," which has been discarded under a tort regime of comparative negligence. "While Exxon has analogized superseding cause doctrine to last clear chance, that argument fails . . . HIRI was not absolved of fault because Exxon had the 'last clear chance' to avoid danger, but because the district court found that Exxon's independent and extraordinarily negligent actions were the sole legal cause of the stranding." J.A. 232 n.7. *Compare* 1 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 5-3 (1994) (approving causation doctrines, including superseding cause) *with id.* § 5-12 (disapproving last clear chance) *and id.* § 5-13 (disapproving contributory negligence); *see also note 11, supra*.



multiple parties. See, e.g., *Connors v. Gasbarro*, 448 A.2d 756, 761 (R.I. 1982) (where negligence of one party was sole proximate cause of collision, comparative negligence does not apply); *Kroon v. Beech Aircraft Corp.*, 628 F.2d 891, 893 (5th Cir. 1980) (same; applying Florida law). And it continues to be established law that the doctrine of proximate cause includes the subsidiary principle of superseding cause. See *Restatement (Second) of Torts*, *supra*, § 442; *Prosser and Keeton*, *supra*, § 44; see also, e.g., *Carlotta v. Warner*, 601 F. Supp. 749, 751 (E.D. Ky. 1985) (superseding cause obviates comparison of parties' negligence; applying Kentucky law); *Ellertson v. Dansie*, 576 P.2d 867, 869 (Utah 1978) (where plaintiff's conduct was superseding cause, comparative negligence does not apply).

The same approach also governs tort claims brought under the modern doctrine of strict products liability. Here too, the doctrine of proximate cause continues to apply in full measure, for products liability law simply relieves the complaining party of the onus of proving negligence, but leaves in place all other elements of proof. See, e.g., *Prosser and Keeton*, *supra*, § 98. Thus, the plaintiff in a products liability case must still prove that the improper design or manufacture of a product was the proximate cause of any alleged harm. See *id.* § 102 at 710.

In such cases, moreover, the principle of superseding cause remains fully applicable. As Dean Prosser has summarized: "virtually all courts have seemingly agreed that the conduct or misconduct of another, including an intermediate seller, the claimant, or anyone else, may be of such a nature or kind as to constitute a superseding cause." *Prosser and Keeton*, *supra*, § 102, at 710; see, e.g., *R.H. Macy & Co. v. Otis Elevator Co.*, 554 N.E.2d 1313, 1317 (Oh. 1990) (superseding cause applies to strict products liability claims); *Buckley v. Bell*, 703 P.2d 1089, 1091-95 (Wyo. 1985) (same); *In re Related Asbestos Cases*, 543 F. Supp. 1142, 1150 (N.D. Cal. 1982) (same).

### C. The Doctrine of Proximate Cause Is Consistent with the Court's Decision in *Reliable Transfer*

Petitioners contend that the doctrine of proximate cause is inconsistent with the Court's holding in *Reliable Transfer* that "when two or more parties have contributed by their fault to

cause property damage in a maritime collision or stranding, liability for such damages is to be allocated among the parties proportionately to the comparative degree of their fault." *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411 (1975). Because this contention depends upon the premise that the principles of proximate cause, including superseding cause, are not consistent with comparative fault, it is squarely refuted by the preceding section. But a fuller understanding of *Reliable Transfer* confirms the same point.<sup>13</sup>

In *Reliable Transfer*, the Court did not have occasion to consider any issue of superseding cause. In that case, a vessel ran aground on a sand bar outside New York Harbor. The vessel's owner brought suit against the United States, alleging that the Coast Guard had failed to maintain the light that marked a breakwater near the spot where the vessel was stranded. The trial court found that the stranding was caused 25% by the Coast Guard's failure to maintain the breakwater light and 75% by the fault of the vessel's captain, who was negligent in setting his course based on little more than guesswork. 421 U.S. at 399. The case was thus legitimately one of multiple causation, where the alleged fault of each party was found as a factual matter to have operated concomitantly to cause the stranding.<sup>14</sup>

The principal issue confronted by the Court was whether liability should be allocated evenly between the two parties, without regard to the trial court's finding that they had been responsible in different proportions for causing the resulting harm. More than a century before, the Court had adopted the "divided damages" rule, which "was an ancient form of rough justice, a means of apportioning damages where it was difficult to measure which party was more at fault." 421 U.S. at 402, 403. Yet the Court recognized that with the passage of time the

<sup>13</sup> Petitioners cite *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 115 S. Ct. 2091, 2097 (1995), and *McDermott, Inc. v. AmClyde*, 114 S. Ct. 1461, 1465 (1994), as recent reaffirmations of *Reliable Transfer*. Pet. Br. 24-25. Neither decision, however, sheds any light on the issues raised in this case.

<sup>14</sup> Petitioners' amicus concedes that *Reliable Transfer* did not address any issues of superseding cause. MLA Br. 15 n.10.



United States had come to be "virtually alone among the world's major maritime nations" in not adopting the more modern rule of proportional fault, *id.* at 403, and that the older rule "produces palpably unfair results" in many cases, *id.* at 405. Therefore, the Court overruled its prior decisions endorsing the "divided damages" rule and adopted the rule of comparative fault to govern maritime tort claims. *Id.* at 411.

It is apparent that the Court adopted the comparative fault rule under federal admiralty law for essentially the same reasons that the common law of torts was embracing the doctrine of comparative negligence during the same period. The old regime had "continued to prevail in this country by sheer inertia rather than by reason of any intrinsic merit. The reasons that originally led to the Court's adoption of the rule have long since disappeared. The rule has been repeatedly criticized" for its inequity. *Id.* at 410-11. Similar concerns prompted general adoption of comparative negligence.

The consequences of *Reliable Transfer* have also been the same as those that flowed from the adoption of comparative negligence in tort law. Several odd doctrines peculiar to admiralty law, which had grown up in reaction to the problems of the "divided damages" rule, became immediately obsolete. "*Reliable Transfer* and the doctrine of comparative negligence also have simplified the law of collision, sounding the death knell for a number of doctrines that are no longer needed," such as the "Major-Minor Fault Rule" and the doctrine of inscrutable fault. 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 14-4, at 271 (1994). By the same token, some of the same doctrines that had been discarded in the common law of torts were similarly irrelevant to a maritime tort regime based on comparative fault, such as "last clear chance" and contributory negligence. See, 1 Schoenbaum, *supra*, §§ 5-12 & 5-13.<sup>15</sup>

By contrast, as the one leading authority on admiralty law to address the issue has concluded, "the superseding cause doctrine can be reconciled with comparative negligence.

<sup>15</sup> The defense of contributory negligence had been rejected in admiralty law much earlier, see *THE MAX MORRIS v. Curry*, 137 U.S. 1 (1890), but the doctrine of "last clear chance" had continued to be applied up until the Court's decision in *Reliable Transfer*.

Superseding cause operates to cut off the liability of an admittedly negligent defendant, and there is properly no apportionment of comparative fault where there is an absence of proximate causation." *Id.* at § 5-3, at 166. Or, as Professor Schoenbaum restates the same point: "If the court can apply the doctrine of superseding cause to apportion injuries to separate causes based on the evidence, there is no need for the doctrine of comparative negligence" to come into play. *Id.* at 165 n.16 (citing *Desmond v. Holland Am. Cruises*, 1981 A.M.C. 211 (S.D.N.Y. 1981), as a case in which the trial court properly applied proximate cause analysis to find that a superseding cause precluded defendant's liability).

Indeed, the clear consistency between causation doctrines and the comparative fault rule is demonstrated by the Court's decision in *Union Oil Co. of Cal. v. THE SAN JACINTO*, 409 U.S. 140 (1972) (Rehnquist, J.). The Court granted certiorari in *Union Oil* to reconsider the same "divided damages" rule that it eventually overruled three years later in *Reliable Transfer*. 409 U.S. at 141. Before addressing that important issue, however, the Court held that it was first necessary to deal with a potentially dispositive threshold issue. *That threshold issue, which ultimately did prove to be dispositive, was the issue of proximate cause.*

In *Union Oil*, a barge under tow collided with a tanker. In the ensuing lawsuit, the trial court determined that though both parties may have been negligent, the tug and barge had been the sole proximate cause of the collision. See *Union Oil Co. of Cal. v. THE TUGBOAT SAN JACINTO*, 304 F. Supp. 519 (D. Ore. 1969). As in the case presently before the Court, the trial court determined as a factual matter that any negligence by the tanker was "not a contributing cause of the collision," and that the *in extremis* rule did not apply. *Id.* at 522. The Ninth Circuit reversed, holding that because the tanker was also at fault, the two parties must each be held liable for half the total damages under the "divided damages" rule, without regard to any finding as to proximate causation. See 409 U.S. at 143-44.

In this posture, the Supreme Court granted review. After recounting the background facts of the collision and the statutory rules of fault that governed the parties' conduct, the Court found itself in agreement with the trial court's

determination that any fault ascribed to the tanker "did not proximately contribute to the collision." *Id.* at 146 (quotations omitted). It then held that the causation issue is logically antecedent to the apportionment of damages, and thus was dispositive of the case. *Id.* The Court therefore reversed and reinstated the trial judgment, without proceeding on to consider whether it should apply the comparative fault rule.<sup>16</sup>

The Court's holding in *Union Oil*, though predating the *Reliable Transfer* decision, is controlling here and completely defeats petitioners' contentions. Here, as in *Union Oil*, the trial court found as a factual matter that though both parties may have been negligent or somehow at fault, only one party was the proximate cause of the harm at issue. Petitioners here claim that the trial court erred by making this threshold determination and by not continuing on to apply the comparative fault rule adopted in *Reliable Transfer*. Yet in *Union Oil* the Court granted review explicitly to consider whether to adopt this same rule, and ended up holding that proximate cause was properly a threshold issue that must be determined before going on to apportion damages under the comparative fault rule. If that was so in *Union Oil*, it must be so in this case also, unless the Court's decision in *Union Oil* is now to be overruled. Petitioners have made no persuasive case to justify this step, however, and in fact sound principles of tort law support the logic of the Court's holding there.<sup>17</sup>

<sup>16</sup> Lower courts have likewise held that to include in a comparative fault determination an element of negligence found not to constitute a contributing cause of the harm is a mistake of law. See, e.g., *Hellenic Lines, Ltd. v. Prudential Lines, Inc.*, 813 F.2d 634, 638 (4th Cir. 1987).

<sup>17</sup> Petitioners' amicus disagrees with petitioners about the continuing validity of the doctrine of superseding cause. See MLA Br. 9, 15-16. Yet amicus' view of the proper approach to resolving such cases, see *id.* at 15-16, is simply inconsistent with the Court's disposition in *Union Oil*. In addition, the clear consistency of causation doctrine and the comparative fault rule adopted in *Reliable Transfer* is also reflected in the Draft Maritime Comparative Responsibility Act with Comments, which has been proposed in Congress and was approved by petitioners' amicus. See 2 *Benedict*

#### D. The Doctrine of Proximate Cause Is Consistent with Principles of Admiralty Law Applied by the World's Leading Maritime Nations

In *Reliable Transfer*, the Court decided to jettison the "divided damages" rule in part because continued adherence to that rule had put the United States out of step with Great Britain and the other leading maritime nations. Indeed, the Court noted that Great Britain and many other countries follow the Brussels Collision Liability Convention of 1910, which provides for apportionment of damages on the basis of the degree of fault caused by the various parties. 421 U.S. at 403-04 & n.7. The relative isolation of the United States in adhering to the outmoded "divided damages" rule was deemed to be of great concern because the Court recognized that this not only cast doubt upon the wisdom of its prior position but also "encourages transoceanic forum shopping." *Id.* at 404. Such incentives to forum shopping are undesirable because they are detrimental to the just and orderly resolution of civil disputes that arise with recurring frequency in international waters.<sup>18</sup> These same problems would arise here, however, if the Court were to abrogate or limit its consideration of the issue of

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on Admiralty § 7, at 1-28.1 n.5 (F. Wiswall, ed.) (7th rev. ed. 1995). The initial section of this draft legislation, which would codify the comparative fault rule, states that "[l]egal requirements of causal relation apply both to fault as the basis for liability and to contributory fault." *Id.* The comments are more elaborate: "For the conduct stigmatized as fault to have any effect under the provisions of this Act it must have had an adequate causal relation to the claimant's damage. This includes the rules of both cause in fact and proximate cause." *Id.* at 1-33 (emphasis added).

<sup>18</sup> For example, one account of the problems that were alleviated by the Brussels Convention describes a maritime collision in which the parties brought suit in England, Belgium, and Holland to take advantage of the distinct rules of recovery that had prevailed in those jurisdictions. See Alfred Huger, *The Proportional Damage Rule in Collisions at Sea*, 13 Cornell L.Q. 531, 531 (1928).



proximate cause in maritime tort cases.<sup>19</sup>

The Brussels Convention itself is wholly consistent with traditional causation doctrine in fixing responsibility for harms that occur on the high seas. Article 3 of the Convention states that if a collision "*is caused by the fault of one of the vessels, liability to make good the damages shall attach to the one which has committed the fault.*" See 6 *Benedict on Admiralty*, Doc. 3-2, at 3-11 (F. Wiswall, ed.) (7th rev. ed. 1995) (emphasis added). From the perspective of this understanding of "fault" as grounded in causation, Article 4 then states the "proportional fault" rule adopted in *Reliable Transfer*. Finally, Article 13, which applies the same provisions to noncollision cases (such as this one), reflects the same causation approach:

This Convention shall extend to the making good of damages *which a vessel has caused to another vessel or to persons or things on board either vessel, either by the execution or nonexecution of a manoeuvre or by the nonobservance of the regulations, even if no collision has actually taken place.*

*Id.* at 3-14 (emphasis added).

It is not surprising that the Brussels Convention, which is followed by "the world's major maritime nations," *Reliable Transfer*, 421 U.S. at 403, incorporates the same causation principles developed over many years by courts in determining responsibility for torts that occur in other contexts. To suggest, as petitioners do, that mere involvement in the events that culminate in allegations of harm suffices to require a party to bear partial legal responsibility for any such harm — regardless of whether that party's actions can be found as a legal matter to have actually caused that harm — is simply too facile.

Moreover, the British courts apply the same causation principles to maritime torts that are applicable to terrestrial torts. Significantly, this means that British maritime decisions

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<sup>19</sup> Petitioners' amicus touches on the importance of "harmony and uniformity" in the international relations of American maritime law, MLA Br. 14-15 (citing *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 150 (1920)), but never suggests or shows that its position is more consistent with such uniformity than is respondents' position.

have long embraced the doctrine of proximate cause, including the established subsidiary causation principle of "*novus actus interveniens*." Two important cases illustrate this approach.

In *THE CITY OF LINCOLN*, 15 P.D. 15 (C.A. 1889), a case decided by the Court of Appeal prior to Great Britain's adoption of the Brussels Convention, a steamer by that name collided with another ship. In the collision, a large portion of the other ship was cut off, which caused its steering compass, log glass, and various charts to be lost. The master of the truncated ship sought to navigate her to port, but was unable to calculate the distances properly in the absence of the ship's log and ultimately stranded the vessel. The owners of the stranded vessel brought suit against the owners of the steamer, which was acknowledged to have been at fault for the collision, for the damages sustained by the stranded vessel.

A unanimous court held that the defendants were liable for the stranding because it resulted directly from the consequences of the collision. Lord Esher recognized that "there may be intermediate circumstances in a case which prevent the ultimate damage from being the direct result of the defendants' act," but concluded that on these facts "the ultimate loss of the ship was caused by the captain being deprived of the means of finding out where his ship was, which deprivation was the direct result of the wrongful act of the defendants." 15 P.D. at 17. Judge Lindley agreed, concluding that because the captain's subsequent conduct was reasonable and not negligent, this "reasonable human conduct" is "such a consequence as in the ordinary course of things would flow from the act." *Id.* at 18. Judge Lopes also concurred on the basis that no "intervening, independent moving cause" led the damaged ship to run aground, and thus the defendants were responsible "for all the natural consequences occasioned by their original misconduct." *Id.* at 19. On the other hand, he stated, "if the consequence had been caused by anything which those on board the [other ship], by the exercise of proper skill and care, could have prevented clearly that liability would not attach." *Id.* The various opinions thus recognized the principle of superseding cause, but held that it did not apply on the facts of that case.

By contrast, the House of Lords approved and carefully applied the doctrine of superseding cause in a later admiralty



case. *S.S. SINGLETON ABBEY v. S.S. PALUDINA*, [1927] App. Cas. 16. That decision came down well after Great Britain had adopted the principles of proportional fault embodied in the Brussels Convention, see Maritime Conventions Act, 1911, 1 & 1 Geo. 5, ch. 57, § 1, and in it the majority expressly distinguished *THE CITY OF LINCOLN* on its facts.

The case involved three ships moored to a quay in Valetta Harbor, Malta. A strong wind came up, which caused the *PALUDINA* to drag her anchors and make contact with the *SINGLETON ABBEY*. Both ships broke away from their moorings, and the *SINGLETON ABBEY* thereafter struck a third ship, the *SARA*, and cast her adrift also. The latter two ships then manouvered in the harbor under their own steam to keep away from the shore and were brought up heading to the wind. The *PALUDINA* was clear of both of the other ships at this time. Twenty minutes later, the *SARA* collided with the *SINGLETON ABBEY*, which caused the *SARA* to sink. [1927] App. Cas. at 16. The owners of the *SINGLETON ABBEY* sued the owners of the *PALUDINA*, which was found liable for the initial collisions. On appeal to the House of Lords, the *PALUDINA* was conceded to have been at fault in causing the initial collisions; the issue instead was whether it was liable for the final collision between the *SINGLETON ABBEY* and the *SARA*, or whether that collision was due to a *novus actus interveniens*. *Id.* at 22.

Lord Sumner, for the majority, concisely stated the controlling principles of law: "the plaintiffs must prove that the *PALUDINA*'s negligence was the cause of [the final collision]. The injury must have been caused directly, though not necessarily solely, by that negligence. If the *PALUDINA* merely created the occasion upon which this injury was inflicted, they fail." *Id.* at 26. On the facts as previously stated, he concluded that the *PALUDINA*'s negligence was not the proximate cause of the final collision, for the captain of the *SINGLETON ABBEY* had reached a position in which he acted as a "free agent," at which point he "could do as he chose and he did so, none the less that he had to decide and act quickly." *Id.* "My lords, the *PALUDINA* is not liable for mere negligence, but only for negligence causing damage. The *SINGLETON ABBEY* herself is the cause of the damage she has suffered, not merely if her captain's action brought it about negligently. She will be the

cause of that damage, if her captain, freely and as the direct consequence of his own decision, brought it about at all." *Id.* at 26-27.<sup>20</sup> He thus distinguished *THE CITY OF LINCOLN*, where the captain steered his vessel wrongly and stranded it "because his means of observation, the log, etc., had been carried away in the collision." *Id.* at 27.<sup>21</sup>

These decisions thus establish that British admiralty law adheres both to the rule of proportional fault in maritime tort cases and to the doctrine of proximate causation, including the subsidiary principle of superseding cause or *novus actus interveniens*. As will be shown in Section II, *infra*, the application of the causation rules adopted in the *S.S. PALUDINA* decision to the facts of this case reinforce respondents' position that the trial court's judgment is correct and should be affirmed. In Lord Sumner's words, subsequent to the breakout Captain Coyne had reached a position in which he acted as a "free agent," at which point he "could do as he chose and he did so, none the less that he had to decide and act quickly" (though Captain Coyne had considerably more time in which to set his course). *Id.* at 26. Respondents may have "created the occasion" for Captain Coyne's actions that caused the stranding of the *EXXON HOUSTON*, but in fact the stranding of the vessel

<sup>20</sup> Lord Sumner also stated his conclusion in terms of *novus actus interveniens*: "[The captain's] action was his own. No part of it was a 'natural' consequence of the *PALUDINA*'s action, except in a sense that would make negligence on his part also a 'natural' consequence. His action was wilful, and, though rapid, was deliberate. The *PALUDINA*'s negligence did not make him take it. Cause and consequence in such a matter do not depend on the question, whether the first action, which intervenes, is excusable or not, but on the question whether it is new and independent or not." *Id.* at 28.

<sup>21</sup> Lord Blanesburgh, concurring with Lord Sumner, added that the handling of the *SARA* was also a *novus actus interveniens* between the *PALUDINA*'s negligence and the sinking of the *SARA*, which broke the chain of causation. *Id.* at 36. The two dissenting Lords did not contest the validity of the doctrine of *novus actus interveniens*, but thought that it did not apply on the facts. See *id.* at 24 (Viscount Dunedin); *id.* at 32 (Lord Phillimore).

was due to petitioners' own "wilful" and "deliberate" actions, which constituted extraordinary negligence. *Id.* at 28. Respondents are "not liable for mere negligence, but only for negligence causing damage. The [EXXON HOUSTON] herself is the cause of the damage she has suffered," for the extraordinary negligence of "her captain, freely and as the direct consequence of his own decision, brought it about" that she was stranded. *Id.* at 26-27.

To maintain consistency with international maritime law, the Court should expressly state that the doctrine of proximate causation, including the subsidiary principle of superseding cause, is consistent with the rule of comparative fault.<sup>22</sup> The endorsement of any other approach to proximate causation in maritime tort cases would encourage the very "transoceanic forum shopping" that the Court deplored and sought to avoid in *Reliable Transfer*. 421 U.S. at 404.

#### **E. The Doctrine of Proximate Cause Is Consistent with Traditional Concerns of Admiralty Law**

Seeking to undermine the doctrine of proximate cause in maritime tort cases, petitioners quote the Court's admonition that "conceptual distinctions" accepted at common law may be "foreign to [the] traditions of simplicity and practicality" embedded in admiralty law. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959).

In *Kermarec*, the Court declined to incorporate into federal admiralty law the "distinctions which the common law draws between licensee and invitee." *Id.* at 630. The Court reached this conclusion, however, because it determined that these distinctions were uniquely "inherited from a culture deeply rooted to the land," and had "originated under a legal system in

<sup>22</sup> Of course, there is nothing improper about this Court seeking to maintain consistency between federal admiralty law and the maritime law of other nations. In brushing aside this cavil in *Reliable Transfer*, the Court observed that "the Judiciary has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and Congress had largely left to this Court the responsibility for fashioning the controlling rules of admiralty law." 421 U.S. at 409 (quotations omitted).

which status depended almost entirely upon the nature of the individual's estate with respect to real property, a legal system in that respect entirely alien to the law of the sea." *Id.* at 630, 631-32. The Court also observed that these feudalistic distinctions posed such a "semantic morass" that the common law was moving "towards imposing on owners and occupiers a single duty of reasonable care in all the circumstances." *Id.* at 631 (quotations omitted). The Court thus declined to embrace such "inappropriate common-law concepts." *Id.* at 630.

The issue of whether American admiralty courts should continue to adhere to principles of proximate causation, however, is entirely different from the situation before the Court in *Kermarec*. The doctrine of proximate cause is not rooted in peculiar considerations that grew out of a "heritage of feudalism," and is not at all tied to a legal system built upon the primacy of real property. To the contrary, it is an established pillar of tort law, fully applicable to tort claims that have little or no connection with the ownership of property, such as negligence and products liability claims.

The consistency between the doctrine of superseding cause and the admiralty rule of comparative negligence has been fully and clearly discussed in a leading treatise on admiralty law. As Professor Schoenbaum has cogently explained:

Another aspect of proximate causation is whether an intervening or superseding cause relieves the defendant of liability. In some cases the defendant may be at fault, but the plaintiff or a third party may have committed an act which supersedes, in terms of cause, the fault of the defendant. The doctrine of superseding cause is thus properly applied to preclude direct causation; otherwise, the court will apportion liability and damages according to comparative fault.

\* \* \*

The doctrine of superseding cause is thus applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable. It is properly applied in admiralty cases.



1 Schoenbaum, *supra*, § 5-3, at 165-66.<sup>23</sup>

In a footnote to this passage, Professor Schoenbaum also cites with approval the "thorough discussion" of this issue in a recent law review commentary. See Herman W.H. Lee, *Abandon Ship? The Need to Maintain a Consistency Between Causation in Admiralty and Causation in Tort*, 25 Creighton L. Rev. 1007 (1992). Petitioners' amicus cites the same commentary (though petitioners do not), see MLA Br. 16 n.11, though it squarely supports respondents' position for many of the reasons already explained above. The article concludes:

The doctrine of superseding cause should not be abrogated because it serves to assist courts in keeping a defendant's liability within reasonable bounds against the innumerable possible causes which may intervene subsequent to the defendant's negligent act. Courts should adhere to [this approach] in future admiralty tort cases by maintaining the consistency between causation in admiralty and common law tort. A court holding otherwise would subject a defendant to greatly increased liability and also encourage overzealous plaintiffs to submerge the court with a tide of lawsuits.

*Abandon Ship, supra*, at 1041. These authorities thus persuasively conclude that proximate cause, including the subsidiary principle of superseding cause, is fully consistent with principles of federal admiralty law. See also *Union Oil*, 409 U.S. at 143-46.

Perhaps even more to the point, application of the settled doctrine of proximate causation simply cannot be avoided in

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<sup>23</sup> Petitioners quote a passage from Professors Gilmore and Black in an attempt to show that "the maritime court has been less ready than the shore courts to find that a subsequent wrongful act by one party breaks the chain of causation." Pet. Br. 23 n.19 (quoting Grant Gilmore & Charles Black, *The Law of Admiralty* § 7-5, at 494 (2d ed. 1975)). Petitioners neglect to mention, however, that this statement was made before the Court's decision in *Reliable Transfer*, which did away with outmoded doctrines of allocating damages that had influenced the maritime courts to strain in applying traditional causation principles.

any legal system that seeks to impose liability rationally and consistently on the basis of fault. As discussed in Section I.B, *supra*, the doctrine of proximate cause thus continues to be applied throughout the common law of torts -- both in negligence cases and in strict products liability cases -- to fix legal responsibility for harms. Any other approach would be incompatible with the foundations of Anglo-American law, whether maritime or otherwise. Indeed, to hold a defendant liable for harm actually caused by another's subsequent, intervening acts would be illogical and inequitable.<sup>24</sup>

The refashioning of proximate cause doctrines sought by petitioners here also would undermine the objective of maintaining consistency between the common law and federal admiralty law governing maritime torts, which is to be desired in the absence of strong reasons to the contrary. This consistency is important to discourage forum shopping in tort cases where federal admiralty jurisdiction may be uncertain or disputed, which are not infrequent even in this Court. See, e.g., *Sisson v. Ruby*, 497 U.S. 358 (1990); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982); *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249 (1972).

Moreover, this case illustrates how a trial court's attention to proximate cause may allow it in some cases to take a simpler and more practical approach in adjudicating all the liability and damage issues raised among multiple parties. By bifurcating the trial here into two distinct phases, Judge Fong was able to defer intricate discovery and trial preparation on the issue of liability for the breakout, as well as on the damage issues, until the question of proximate cause was first resolved. The parties estimated that bifurcation could save them at least fifty days of depositions, amounting to more than \$750,000 in expenses, on these issues, as well as reducing the amount of trial time by approximately 80%. J.A. 49. Even without bifurcation,

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<sup>24</sup> In this case, for example, Judge Fong powerfully captured this point by concluding that because petitioners' extraordinary negligence was the superseding and proximate cause of the vessel's stranding, it would be "manifestly unjust to hold anyone legally responsible for the consequences of these acts other than [petitioners]." J.A. 176 (emphasis added).



attention to this threshold issue may succeed in simplifying the disposition of many cases. See, e.g., *Union Oil*, 409 U.S. at 146 (holding that where one party is the sole proximate cause of any harm, the case is correctly resolved without determining issues of comparative fault).

In this case, the trial of the issues addressed in Phase One alone consumed three weeks of courtroom time. Had the court been obliged to conduct a single trial that addressed each of the various liability and damage issues involving all of the various parties -- which petitioners erroneously suggest it should have been required to do as a constitutional matter -- it would have been unable to effect any simple, practical resolution of the dispositive issues presented. The resulting judicial melee would have amply justified Dean Prosser's concern that in comparative negligence cases involving multiple parties, such a "[t]heoretically perfect" procedure would lead to "almost incredible complexity in the resulting issues," thereby multiplying the burdens and expense that would have to be borne by both the litigants and the court. William L. Prosser, *Law of Torts* § 67, at 438 (4th ed. 1971).<sup>25</sup>

## II. THE COURTS BELOW PROPERLY APPLIED THE PRINCIPLES OF PROXIMATE CAUSE ON THE FACTS OF THIS CASE.

After a lengthy bench trial, Judge Fong determined that Captain Coyne's extraordinary negligence in navigating the vessel after it had reached a position of safety at 1830 was the sole proximate cause of its stranding. J.A. 173. Under standard legal principles of *respondeat superior*, whose application is not contested here, Captain Coyne's conduct was attributable to petitioners, since he was acting within the scope of his employment at the time. The trial court thus determined that

<sup>25</sup> This sort of judicial melee, however, is precisely what petitioners and their amicus believe is required by the comparative fault rule. See Pet. Br. 21 ("*Reliable Transfer* requires that *all* the faults of *all* the parties must be compared regardless of the particular order in which the faults occurred."); *id.* at 27 (same); MLA Br. 15-16 (same). Yet this position is totally at odds with the Court's holding in *Union Oil*.

respondents were not liable to petitioners for any damages that may have resulted from the stranding of the vessel. The Court of Appeals unanimously affirmed this judgment, upholding all of the trial court's factual findings. On the facts of this case, this outcome is plainly correct and amply justified.

Initially, it is crucial to recognize that the trial court found, as a matter of fact, that at 1830 the EXXON HOUSTON had reached a position of safety, at which juncture the causal forces set in motion by the initial breakout of the vessel had run their course. See J.A. 175 ("By 1830, the EXXON HOUSTON was heading out to sea and in no further danger of stranding. Only the grossly negligent actions of its master endangered the vessel further."). The trial court thus determined, in essence, that a complete break in the chain of causation had occurred at this juncture. One way of analyzing the facts of this case, therefore, is that the original breakout simply did not *cause* the vessel's stranding, without even reaching the perhaps more theoretical issue of whether it could be held to have proximately caused that result. As the court restated its conclusion: "The EXXON HOUSTON had reached a safe position and only the gross negligence of its master put it into further danger." *Id.* at 174.

In making this determination, the court acted as the ultimate factfinder, and its determination on this point was upheld on review by the Court of Appeals. Deference to this finding is in accord with the *Restatement*, which describes the function of the jury (or, as in this case, the court as factfinder) as including the determination of "whether the defendant's conduct has been a substantial factor in causing the harm to the plaintiff." *Restatement (Second) of Torts, supra*, § 434.<sup>26</sup> The trial court's findings and conclusions on this particular point must therefore be affirmed by this Court unless petitioners can establish that they are clearly erroneous, which they manifestly

<sup>26</sup> Dean Prosser likewise notes that it is properly the function of the trial court to determine "any limitation of liability as to consequences directly caused, or any case in which the defendant's responsibility is superseded by abnormal intervening forces," with any legitimately disputed factual questions to be resolved by the primary factfinder. William L. Prosser, *Law of Torts* § 45, at 290 (4th ed. 1971).

are not. See, e.g., *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985). Indeed, these factual findings are especially solid under the "two court rule" that this Court applies in cases where findings of fact were concurred in by two courts below.<sup>27</sup>

The import of this factual finding — that the EXXON HOUSTON reached a position of safety at 1830 — is to compel the conclusion that the chain of causal forces from the breakout of the vessel to its stranding was effectively severed at 1830. Understood in terms of the *Restatement*, this finding precludes any conclusion that the breakout of the vessel was "a substantial factor in causing the harm [i.e., the stranding]." *Restatement (Second) of Torts* § 434. This factual finding is dispositive. Petitioners seek to recast the trial court's factual findings to conform to the *Restatement* by repeatedly referring to the breakout as "a substantial factor in the tanker's loss," Pet. Br. 20 (emphasis added); see also *id.* at 17, 23, 29, but this is merely to take a different view of the underlying facts, which is not permissible on review here. The more accurate account is that stated by Lord Sumner in *S.S. PALUDINA*: respondents are "not liable for mere negligence, but only for negligence causing damage"; where the breakout "merely created the occasion" for the ultimate stranding of the vessel, but Captain Coyne reached a position of safety in which he acted as a "free agent" who "could do as he chose," then the EXXON HOUSTON "herself is the cause of the damage she has suffered," particularly where it came about by the extraordinary negligence of her captain. [1927] App. Cas. at 26-27.

In addition, the trial court determined that Captain Coyne's subsequent conduct was quite unusual — enough so as to constitute "extraordinary negligence." From this standpoint as well, the court found that petitioners' actions were properly

<sup>27</sup> See, e.g., *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional show of error."); *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 665 (1987) (quoting *Graver*, 336 U.S. at 275). The "two court rule" was cited with approval in *Reliable Transfer*, 421 U.S. at 401 n.2.

viewed as the sole proximate cause of the vessel's stranding. J.A. 166-74. The trial court explicitly found that Captain Coyne did not merely make a few mistakes in his handling of the vessel, but was "grossly negligent" in a number of different ways, which led him to navigate the vessel squarely into a charted reef. See J.A. 171, 174, 175. The trial court rested this further determination on several alternative grounds.

First, the court recognized the settled admiralty rule that "[w]hen a moving vessel strikes a charted reef, it is presumed that the vessel is at fault." J.A. 166. This rule was first established in *THE LOUISIANA*, 70 U.S. (3 Wall.) 164 (1865), and it remains just as valid today. Professor Schoenbaum endorses its utility as embodying "both the burden of producing rebuttal evidence and the burden of persuasion," thus operating as a sensible version of *res ipsa loquitur* in cases that involve a collision between vessels or the collision of a vessel into a fixed structure. 2 Schoenbaum, *supra*, § 14-3, at 268-69. The trial court recognized that the offending party may seek to rebut the presumption, but concluded that petitioners failed to meet their burden "of proving by a preponderance of the evidence that the EXXON HOUSTON acted with reasonable care, or that the stranding was unavoidable." J.A. 167.

Second, the trial court found that Captain Coyne did not comply with standard navigation practice as stated in controlling federal regulations that require specific compliance with navigation safety directives. See J.A. 168-69 (quoting 33 C.F.R. § 164.11). The court found that between 1830 and 2004, Captain Coyne "failed to have the position of the vessel fixed and plotted on a navigational chart, in violation of 33 C.F.R. § 164.11(c)." J.A. 169. In addition, between 1948 and 2000, Captain Coyne was alone on the bridge, and "was not capable of both directing and controlling the movements of the vessel and fixing the vessel's position, in violation of 33 C.F.R. § 164.11(a)." J.A. 169. Failure to comply with these directives again raises a presumption of fault, which is rebuttable, but which was not rebutted by petitioners here. *Id.* at 168 (citing *THE PENNSYLVANIA*, 86 U.S. (19 Wall.) 125 (1873)).<sup>28</sup>

<sup>28</sup> Petitioners have not challenged the validity of either the *LOUISIANA* rule or the *PENNSYLVANIA* rule in the proceedings before



The gravity and importance of strict compliance with these requirements should not be underestimated. As one leading authority has cautioned:

The general lawyer, used to the rather fast-and-loose way of a court with a statute, must accustom himself to a far different atmosphere in dealing with these Rules, for they are strictly and literally construed, and compliance is insisted upon. This is as it should be, for, though they have the force of statute, they are not couched in legal terms of art, and are not lawyers' law, but are plain and simple directions addressed to ship's officers, the more competent among whom have most of them substantially committed to memory.

Grant Gilmore & Charles Black, *supra*, § 7-3, at 489; see also 2 Schoenbaum, *supra*, § 14-2, at 256 (these directives "are not mere prudential regulations or guidelines; they are binding enactments that must be adhered to closely").

In yet another attempt to recharacterize the facts here, petitioners and their amicus try to squeeze this case into the regulatory exception for actions taken *in extremis*. See Pet. Br. 26-27; MLA Br. 14 n.9. Yet the trial court found that "Captain Coyne and his crew had ample time to consider the situation calmly and deliberately," J.A. 159, and expressly concluded that as his decisions "were made calmly, deliberately and without the pressure of an imminent peril, the *in extremis* rule cannot be applied in this case," J.A. 170.

Third, in an extremely thorough review of the facts proved at trial, Judge Fong went on to determine that Captain Coyne committed "extraordinary" negligence in his handling of the vessel quite independent of any legal presumptions drawn from the foregoing points. In this respect, the court determined that petitioners acted "negligently, unreasonably and in violation of the maritime industry standards" in numerous ways: (1) by not deploying sufficient chain to anchor the ship at 1747; (2) by not

this Court; and neither rule could properly be placed in issue here in any event, for the trial court specifically went on to determine that petitioners committed extraordinary negligence even apart from any such presumptions, as is further explained immediately below.

requesting assistance from the Coast Guard or others; (3) by not attempting to anchor the ship again after 1747; (4) by not continuing to back the ship after 1830 until it reached a safe distance from the shore; (5) by choosing to linger in the vicinity of the shore, only about one-half mile from the actual grounding line. J.A. 170-71. In addition, Captain Coyne's failure to plot fixes of the vessel's position between 1830 and 2004, which would have avoided any danger of stranding, "was grossly and extraordinarily negligent and in violation of the maritime industry standards." J.A. 171. His final turn, which led immediately to the grounding of the vessel, was "grossly and extraordinarily negligent and in violation of the maritime industry standards because he commenced it without knowing the vessel's position." J.A. 171. Once again, the court found that he could have avoided any danger of stranding if he had simply backed out to sea or turned in the other direction. J.A. 171.

The court thus presented ample justification for its determination that Captain Coyne's handling of the vessel was grossly and extraordinarily negligent. Under the causation principles set out in the *Restatement*, however, this fact operates as a superseding cause of the vessel's stranding. The court established this point by applying the list of considerations presented in section 442 of the *Restatement*, which are described as being "of importance in determining whether an intervening force is a superseding cause of harm to another." *Restatement (Second) of Torts* § 442. The trial court carefully applied those factors in concluding that Captain Coyne's extraordinary negligence both in "failing to fix and plot his vessel's position" and in "ordering the final starboard turn" constituted superseding causes of the stranding of the EXXON HOUSTON. J.A. 173-75.<sup>29</sup> The court could also have

<sup>29</sup> Petitioners seek vindication in section 442B of the *Restatement*, Pet. Br. 29-30, which states that where the defendant's negligence "creates or increases the risks of a particular harm and is a substantial factor in causing that harm," then the intervening act of a third party will not relieve the defendant of liability unless it is "not within the scope of the risk created by the actor's conduct." *Restatement (Second) of Torts* § 442B. Yet the factual findings of the



relied upon section 447 of the *Restatement*, which indicates that where the intervening conduct of another party is so "extraordinarily negligent" as to be not within reasonable expectations, it stands as a superseding cause of any subsequent harm. *Restatement (Second) of Torts* § 447.

Once again, it does not matter for purposes of this Court's review whether petitioners agree or disagree with the trial court's version of the facts. In this bench trial, Judge Fong was the proper factfinder. His findings and determinations cannot be overturned "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.*, 336 U.S. at 275; see *supra* note 27. No such showing has been made here.

### III. ADMIRALTY COURTS SHOULD APPLY PRINCIPLES OF CAUSATION FROM THE COMMON LAW OF CONTRACTS, FRAMED IN TERMS OF "FORESEEABILITY," IN CASES INVOLVING MARITIME CONTRACTS.

Petitioners have also framed their claims against respondents, based on the same underlying facts, in terms of contract law by pleading them in the alternative as warranty claims.<sup>30</sup> They thus seek to blur the important lines that the Court has sought to draw between tort law and warranty law concerning product liability claims. See *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986). Even if petitioners' tort claims are treated under the asserted heading of warranty law, however, the same principles of causation should govern such maritime contract claims as are applied in the common law of contracts. As will be seen, these

trial court here foreclose any determination that the breakout was "a substantial factor" in causing the stranding of the EXXON HOUSTON, and the independent and extraordinary negligence of Captain Coyne cannot be included within the scope of the risk created here, as this point is elaborated more fully in section 447 of the *Restatement*.

<sup>30</sup> In petitioners' complaint, the first two causes of action include warranty claims based on breach of warranty of safe berth and breach of warranty of workmanlike performance, as well as other related but more limited contract claims. See J.A. 33-38.

principles provide no support for petitioners in this case.

#### A. Foreseeability Principles from Contract Law Afford No Grounds for Granting Relief to Petitioners Here

The common law of contracts applies the same general principles of causation as does the common law of torts, with one important caveat: recovery of damages for breach of contract is more limited than recovery for breach of duty in tort law. Thus, if petitioners should not recover on their tort claims here, then likewise they should not recover on their warranty claims, which are premised on the same underlying facts.

Section 351 of the *Restatement (Second) of Contracts* specifies that the foreseeability principle is the accepted limit of recovery on contract claims at common law:

- (1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
- (2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
  - (a) in the ordinary course of events, or
  - (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

*Restatement (Second) of Contracts*, § 351 (1981). As Comment a to this section explains further: "[T]he requirement of foreseeability is a more severe limitation of liability than is the requirement of substantial or 'proximate' cause in the case of an action in tort or for breach of warranty." *Id.* at cmt. a.

The same point is made by the leading commentators. Professor Williston observes: "The law of torts and the law of contracts differ in this respect. For a tort, the defendant becomes liable for all proximate consequences, while for breach of contract he is liable only for consequences which were reasonably foreseeable at the time when it was entered into, as probable if the contract were broken." 11 *Williston on Contracts* § 1344, at 227 (W. Jaeger ed.) (3d ed. 1968). Similarly, Professor Corbin notes that numerous courts have barred recovery "because the injury was said not to be the

'proximate' result of the breach," but where they have ventured to define this principle, "it will practically always be found that it is expressed in terms of the possibility of foresight." 5 *Corbin on Contracts* § 1000, at 26 (1964); see also *id.* at § 997; see also *East River Steamship Corp.*, 476 U.S. at 874-75 (noting and explaining this same distinction in the context of general maritime law); *Petitions of The Kinsman Transit Co.*, 338 F.2d 708, 721-26 (2d Cir. 1964) (same), *cert. denied*, 380 U.S. 944 (1965).

It has been widely recognized that the same underlying facts could give rise to either a tort claim or a breach of warranty claim, depending on a claimant's mere choice of pleading, particularly with the modern evolution in tort law from negligence claims through warranty claims to strict products liability claims. In this situation, the distinction between tort law and contract law has been minimized by expressly basing a party's recovery for a breach of warranty that causes injury to person or property on tort principles of proximate cause. See, e.g., *Restatement (Second) of Contracts* § 351 cmt. a (noting that the requirement of proximate cause applies "in the case of an action in tort or for breach of warranty"). The Uniform Commercial Code, in particular, accomplishes this result by specifying that in warranty cases involving "injury to person or property," recovery may be had only for consequential damages "proximately resulting" from the breach of warranty. U.C.C. § 2-715(2)(b); see, e.g., *Waggoner v. Town & Country Mobile Homes, Inc.*, 808 P.2d 649, 652 (Okla. 1990) ("manufacturers' products liability and the UCC warranty provisions provide parallel remedies" for injury to other property).

All of these same principles should be applied in cases involving maritime contract claims. Although the foreseeability test is highly fact-specific, it is a familiar standard that the courts apply in many areas of law. It remains serviceable in resolving maritime contract claims for the same reasons that it has been maintained in the common law of contracts. Indeed, the Court has approved the foreseeability principle as a means of resolving true maritime warranty claims. See *East River Steamship Corp.*, 476 U.S. at 874. At the same time, principles of proximate causation are most

appropriate to govern breach of warranty claims involving consequent injury to person or property -- which are indistinguishable from tort claims -- and should be applied in such cases consistent with the Uniform Commercial Code.

Applying these principles to petitioners' claims affords them no grounds for relief here. As explained at length in Section II, *supra*, the trial court determined that the breakout was not a proximate cause of the stranding of the EXXON HOUSTON, and that Captain Coyne's conduct, which was extraordinarily negligent in a number of respects, was in fact the sole proximate cause of the stranding. Compare *Union Oil*, 409 U.S. at 146. These findings preclude recovery on petitioners' tort claims, and thus *a fortiori* preclude recovery on their contract claims. The trial court also expressly found that *neither* the decision to turn the ship toward the coast *nor* the actual attempt to make the turn, which was "extraordinarily negligent," was "a foreseeable consequence of the breakout." J.A. 175. These further findings, which petitioners have not challenged on review, also preclude relief on their warranty claims.<sup>31</sup> Even if these findings had been challenged, they could not be overturned by this Court "in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. Co.*, 336 U.S. at 275; see also *supra* note 27. No such showing has been made or could be made in this case.

#### **B. These Common-Law Principles Should Be Applied in Cases of Maritime Contracts**

The principles described in the preceding section, which govern contract claims at common law, should be applied in federal admiralty law for at least three reasons.

First, petitioners have presented no sound reason why admiralty law should differ from the common law with respect to these points. Instead, they simply quote, out of context, a passage from one case involving a warranty claim, which does not advance their position. Pet. Br. 35. The quoted passage is:

---

<sup>31</sup> At one point, petitioners do contradict the trial court's finding that Captain Coyne's conduct was not foreseeable, see Pet. Br. 29, but this is just an improper recasting of the facts, which disregards the express finding that the conduct was extraordinarily negligent.



... liability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

*Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315, 324 (1964). Even taken out of context, this passage is fully consistent with the purposes served by application of the doctrine of proximate cause.

A fuller examination of the case, however, shows that this passage (and the case as a whole) did not discuss whether to apply the doctrine of proximate causation to warranty claims; instead, it concerned whether a stevedore's liability under its warranty of workmanlike service should be premised on negligence or strict liability. In holding that strict liability should be applied, the Court explained its reasons in the passage quoted above. *See id.* at 323-24; *see also East River Steamship Corp.*, 476 U.S. at 865-66 (characterizing *Italia Societa* in these terms). Yet this discussion does not illuminate the issues raised here concerning maritime warranty claims. Strict liability already applies to these claims, which are essentially a repackaging of petitioners' tort claims. The principal issue before this Court, instead, is the permissible grounds for recovery on these claims under the foreseeability principle. None of petitioners' citations challenges the established doctrine of foreseeability in contract law.<sup>32</sup>

Second, the Court recently evinced its concern to maintain a sensible relationship between tort law and warranty law in maritime cases that involve claims of consequent injury to

<sup>32</sup> Although the infirmities of *Italia Societa* itself are perhaps not especially germane to the resolution of this case, it should be pointed out that Professor Schoenbaum fully canvasses the "spurious origin" of the warranty of workmanlike performance — one of the claims pleaded by petitioners in this case, *see J.A.* 36-37 — which he describes as "one of the most ambiguous and controversial concepts in all of admiralty law," whose application has "had very harsh and strange results," and which has been only partially overruled by subsequent statutes. *See* 1 Schoenbaum, *supra*, § 5-8, at 190-99.

person or property. In the *East River Steamship* case, the Court held that strict products liability law is part of the general maritime law. *See* 476 U.S. at 864-66. Yet where a claim is based on damage only to the product itself, with no consequent injury to the person or to any other property, the Court held that such claims can be based only on warranty law, not on tort law, for otherwise "contract law would drown in a sea of tort." *Id.* at 866. By the same token, where, as in this case, a tort claim involving injury to other property is repackaged as a warranty claim, recovery should not be expanded beyond the principles of proximate cause that apply in tort law, so as to prevent tort law from drowning in a sea of warranty. For this reason also, the most sensible approach here is to follow section 2-715(2)(b) of the Uniform Commercial Code and hold that tort principles of proximate cause govern recovery on such warranty claims, as explicitly sanctioned by the *Restatement (Second) of Contracts*. *See id.* § 351 cmt. a.

Third, the concern that federal admiralty law should not stimulate forum shopping by departing from settled common-law principles is also apt in contract cases, where disputes over the proper extent of admiralty jurisdiction frequently recur. As Justice Harlan observed, "The boundaries of admiralty jurisdiction over contracts . . . being conceptual rather than spatial, have always been difficult to draw." *Kossick v. United Fruit Co.*, 365 U.S. 731, 735 (1961). It thus is especially important to maintain harmony between these two founts of law whenever possible. This objective can be readily achieved by applying accepted principles of contract and warranty law to the same kinds of claims when raised in a maritime setting. *See, e.g.,* 1 Schoenbaum, *supra*, § 5-7, at 186 (advocating reliance by admiralty courts on UCC concepts in addressing claims based on express and implied warranties, which will lead to "very little, if any, difference in the cases between the general admiralty law, the UCC, and the common law").



**IV. TRIAL COURTS ENJOY THE SAME BROAD DISCRETION TO ESTABLISH ORDERLY AND EFFICIENT PROCEDURES FOR DETERMINING THE FACTUAL AND LEGAL ISSUES IN ADMIRALTY CASES AS IN ALL OTHER CASES.**

Petitioners' brief reveals that the real object of their recriminations is the bifurcation order issued by Judge Fong prior to trial. See Pet. Br. 3-8, 17, 21-22, 33. Yet because petitioners did not seek certiorari on the question of whether the trial court erred in granting bifurcation, they cannot now seek reversal on this ground. See S. Ct. R. 14.1(a); see also, e.g., *Yee v. City of Escondido*, 503 U.S. 519, 535-38 (1992) (explaining importance of strict compliance with the rule).

In any event, petitioners' complaints on this score should have no bearing on the Court's resolution of the questions actually presented in this case. For it is well settled that trial courts enjoy broad discretion to issue such orders in order to structure trial proceedings in the manner that they determine would be most conducive to expedition and economy for both litigants and the court. Indeed, Rule 42(b) of the Federal Rules of Civil Procedure -- which is fully applicable in admiralty cases -- specifically vests such authority in the District Court:

**(b) Separate Trials.** The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be most conducive to expedition and economy, *may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or third-party claims, or issues*, always preserving inviolate the right of trial by jury. . . .

Fed. R. Civ. P. 42(b) (emphasis added); see also 9 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2388, at 475 (1995) (Rule 42(b) applies in admiralty cases).

Petitioners baldly contend that the trial court's decision to bifurcate the causation issues among the multiple parties in this case deprived them of due process of law. See Pet. Br. 33 (citing *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S.

494 (1931)).<sup>33</sup> Yet petitioners are in no different position from any other litigant who feels aggrieved that the trial court exercised its discretion to set the schedule of proceedings in a manner that it did not desire. In courts across the country every day, parties lose cases in part because the trial court has isolated a potentially dispositive issue and given it priority over other issues that might have redounded more advantageously for them had the issues been considered in a different order. This is likewise true in many admiralty cases. See, e.g., *Lisa v. Fournier Marine Corp.*, 866 F.2d 530 (1st Cir.) (bifurcating liability issues for trial in admiralty case), *cert. denied*, 493 U.S. 819 (1989); *McGrath v. J. Ray McDermott & Co.*, 81 F.R.D. 23 (E.D. La. 1978) (same); *Bernardo v. Bethlehem Steel Co.*, 200 F. Supp. 534 (S.D.N.Y. 1961) (same), *aff'd*, 314 F.2d 604 (2d Cir. 1963). Such trial court rulings do not call for constitutional relief.<sup>34</sup>

The Court of Appeals considered and rejected petitioners' claim that the bifurcation order in this case represented an abuse of discretion and a deprivation of their constitutional rights. The court recognized that this claim ultimately reduced to nothing more than petitioners' argument that the doctrine of superseding cause is not viable in maritime tort cases, with which the court disagreed. As the court concluded:

Given the validity of the superseding cause doctrine in cases such as this one, the district court's

<sup>33</sup> The *Gasoline Products* case is truly inapposite here, for it addressed Seventh Amendment concerns in a case where the Court was troubled about the prospect of retrying part of a case before a jury in a posture that seemed likely to generate "confusion and uncertainty" for the jury. See 283 U.S. at 500-01. There is no right to a jury trial in admiralty cases, see, e.g., *Waring v. Clarke*, 46 U.S. (5 How.) 441, 460 (1847); Fed. R. Civ. P. 38(e), and no prospect remains in this case of a jury trial on any nonmaritime issue, see *supra* note 5.

<sup>34</sup> Indeed, it has been held that Rule 42(b), which was adopted after the Court's decision in the *Gasoline Products* case, has incorporated compliance with that standard into its provisions. See, e.g., *In re Bendectin Litig.*, 857 F.2d 290, 308-09 (6th Cir. 1988), *cert. denied*, 488 U.S. 1006 (1989).

decision to bifurcate the trial cannot be said to have 'severed the unseverable' or to have prejudiced Exxon. *Because bifurcation of the trial was expeditious and appropriate in light of the circumstances of this case and did not result in prejudice to Exxon*, we hold that the district court did not abuse its discretion in choosing to take this approach.

J.A. 226 (emphasis added).

This conclusion is plainly correct. In granting bifurcation, Judge Fong realized that "bifurcation could obviate the need for extensive discovery, trial preparation, and weeks of trial if the court first determines the cause or comparative causes of the grounding, excluding the cause of the breakout," which would require much more complicated matters of proof. J.A. 71. The court also noted that Phase One of the trial would address 80% of petitioners' damage claims, which suggested that "a separate trial offers the probability of settlement after the conclusion of the first phase." J.A. 72. Moreover, the court concluded that if it were to determine "that the navigation of the EXXON HOUSTON was the proximate cause of its grounding, then it would be unnecessary for the court to resolve the issue of 'comparative fault'" or to calculate the damages related to the stranding of the vessel. J.A. 72. *Compare Union Oil*, 409 U.S. at 146 (same). For these reasons, the trial court acted well within its discretion in ordering bifurcation to focus initially on the issue of proximate cause. Indeed, such orders are commonplace in complex tort cases involving multiple claims and multiple parties. *See, e.g., In re Beverly Hills Fire Litig.*, 695 F.2d 207 (6th Cir. 1982) (granting bifurcation in tort case on issue of causation), *cert. denied*, 461 U.S. 929 (1983); *In re Bendectin Litig.*, 857 F.2d at 308-14 (granting bifurcation in tort case on issue of proximate cause).

Moreover, there is no reason why this Court should hamper federal admiralty courts in exercising their discretion to structure trial proceedings "conducive to expedition and economy" in the same manner as the federal courts do in other civil cases under Rule 42(b). Maritime torts involving multiple parties can be just as complex, and perhaps even more so, than such cases which arise on land. The need for orderly and

efficient trial proceedings, which in the long run serve the interests of courts and litigants alike, is as great in admiralty cases as in all others.

Indeed, a leading authority on trial procedure in the federal courts expressly states that the application of this rule *may be even more common and beneficial in admiralty cases than in other civil cases*:

In certain suits in admiralty, separation for trial of the issues of liability and damages, or of the extent of liability other than damages, . . . had been common and beneficial, particularly in view of the statutory right to interlocutory appeal in admiralty cases . . . .

Thus, the amendment of Rule 42(b) in 1966 was intended to reassure the admiralty bar that there would be no change in this practice.

9 Charles A. Wright & Arthur R. Miller, *supra*, § 2388, at 475. The Court should thus reject petitioners' invitation to constitutionalize their quarrel with the manner of proceedings followed here.

# CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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February 7, 1996



8  
No. 95-129

SUPREME COURT, U.S.  
FILED

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In The  
**Supreme Court of the United States**  
October Term, 1995

**EXXON COMPANY, U.S.A.;  
EXXON SHIPPING COMPANY,**

*Petitioners,*

v.

**SOFEC, INC.; PACIFIC RESOURCES, INC.;  
HAWAIIAN INDEPENDENT REFINERY, INC.; PRI  
MARINE, INC.; PRI INTERNATIONAL, INC.,**

*Respondents,*

v.

**GRIFFIN WOODHOUSE, LTD.; BRIDON FIBRES  
AND PLASTICS, LTD.,**

*Third-Party Respondents.*

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February 7, 1996

**BEST AVAILABLE COPY**

**RESTATEMENT OF QUESTIONS  
PRESENTED FOR REVIEW**

1. Whether *Reliable Transfer's* adoption of comparative fault precludes the application of the doctrine of superseding cause under federal admiralty law.

2. Whether, on the basis of unchallenged findings that the stranding was not a foreseeable consequence of the respondents' conduct but instead was a consequence Exxon could have avoided, the trial court was correct in entering a judgment that denied Exxon recovery for damages relating to the stranding of its vessel.

### LISTING UNDER SUP. CT. R. 29.1

This brief is filed on behalf of respondents Pacific Resources, Inc., Hawaiian Independent Refinery, Inc., PRI Marine, Inc., and PRI International, Inc. (collectively "HIRI"). These respondents are all subsidiaries of The Broken Hill Proprietary Company, Ltd., which is incorporated in Victoria, Australia. There are no other parent corporations or subsidiaries (except wholly-owned subsidiaries).

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## OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported in *Exxon Shipping Co. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995). A copy of the opinion is reprinted in the Joint Appendix ("JA") at 209-33. The district court's findings of fact and conclusions of law are reprinted at JA 140-76, and its judgment is reprinted at JA 201-06.

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 JURISDICTION

The opinion of the court of appeals was filed on April 26, 1995. Exxon's petition for rehearing was denied by order entered May 24, 1995; a copy of the order is included in the certiorari petition as Appendix B. The district court's jurisdiction was in admiralty, pursuant to 28 U.S.C. § 1333. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1). The petition for writ of certiorari was filed on July 24, 1995, and this Court's order granting certiorari was issued on November 22, 1995.

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 STATEMENT OF THE CASE

This case arises out of the stranding of Exxon's oil tanker near Barbers Point off the island of Oahu. Exxon's Captain Coyne drove the tanker onto a charted reef at 8:09 p.m. (2009 military time).<sup>1</sup> Nearly three hours earlier, the tanker had broken away from HIRI's "single point

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<sup>1</sup> The opinions below employ military time, and, for consistency with the record, references to time in this brief will follow that practice.

mooring" buoy (the "SPM"), where it was discharging oil into cargo hoses.<sup>2</sup> The SPM is situated in deep water, one and one-half miles off the coast. The SPM is not confined in a bay or harbor but is, instead, situated in open ocean.

### *Summary of Facts*

At 1728, in the midst of a "Kona" storm,<sup>3</sup> Exxon's tanker broke away from the SPM. Approximately 840 feet of hose remained bolted to the tanker, and, concerned that the hose might foul the propeller if the vessel went forward, the vessel's captain backed the tanker away from the SPM. [JA 146-47 (¶¶25-29)]<sup>4</sup> Captain Coyne backed the tanker for twelve minutes, to a safe anchorage, and attempted to deploy the anchor. For unexplained reasons, Captain Coyne chose not to pay out the additional "shots" of chain needed to hold the tanker in place,

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<sup>2</sup> Respondents Pacific Resources, Inc., PRI International, Inc., and Hawaiian Independent Refinery, Inc. are affiliated companies and own or operate the SPM. [JA 141 (¶2)] The oil is discharged through hoses into submerged pipelines that run along the sea floor to the on-shore refinery. [JA 146 (¶23)]

<sup>3</sup> A "Kona" storm has winds and seas generally from the south and toward the coast.

<sup>4</sup> At 1715, the chafe chain holding the tanker to the SPM parted, allowing the tanker to drift away from the SPM. As the tanker drifted, the two cargo hoses broke, the first at 1725 and the second at 1728. The first hose broke near the water line and was not a factor in the subsequent handling of the tanker. The parting of the second hose was designated by the district court as the "breakout." [JA 146-47 (¶¶25-28)] All references hereafter to the "hose" are to the second hose.

and the attempt to anchor failed.<sup>5</sup> Even though the tanker's subsequent course took it through numerous safe anchorages, Captain Coyne never again attempted to deploy the anchor. [JA 150 (¶¶41-42)]

After bringing the anchor home, Captain Coyne began backing the tanker in a generally westerly direction out to sea and away from shallow water. By 1803, an assist vessel, the Nene, had secured the end of the hose and was able thereafter to keep it away from the tanker's rudder and propeller. The tanker continued to back in its westerly direction out to sea until 1830. [JA 150 (¶¶43-44)]

Under Captain Coyne's direction, the position of the tanker had been fixed and plotted on navigational charts at 1740, 1747, 1803, 1820, and 1830. [JA 150 (¶44)] However, after 1830, no additional navigational plots were taken until 2004, a lapse of more than one and one-half hours. Ship personnel were available to plot navigational fixes, but, again for unexplained reasons, Captain Coyne failed to employ them. Instead, he attempted to navigate by "parallel indexing," a technique that utilizes radar only. Navigation by parallel indexing without plotted fixes is inherently dangerous and is a violation of both industry standards and Exxon's own policies and guidelines. [JA 152-53 (¶¶49, 54-57)]

At 1831, Captain Coyne made the decision to quit backing out to sea, although he could have continued to do so. [JA 151 (¶46)] Instead, he began directing the

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<sup>5</sup> It is standard practice to release additional shots of chain to enhance the holding power of the anchor. Five or six shots of chain would have been required to hold the tanker under the prevailing conditions. [JA 148-49 (¶¶35-38)]



tanker in a series of alternating forward and backward movements. This was done to create a lee on the port side of the tanker to allow the hose to be disconnected with reduced exposure to wind and sea conditions. It took more than one hour to disconnect the hose. [JA 151-52 (¶48); 156 (¶64)] During this entire time, notwithstanding the prevailing winds that had a tendency to push the tanker toward the coast, no navigational fixes were plotted. [JA 152 (¶49)]

At 1944, after the hose had been disconnected and was suspended from the tanker's crane (for lowering into the water), the tanker and Nene moved apart, causing the crane to collapse. The hose fell free, and, at 1947, the Nene pulled the hose clear of the tanker. However, the collapse of the crane injured the crane operator, who was taken to his quarters. Captain Coyne sent the second mate from the bridge to determine the condition of the crane operator, which left Captain Coyne as the only officer on the bridge until 2000. Other officers were available for bridge service, but Captain Coyne did not call for them. [JA 156 (¶¶64-69)]

At 1956, Captain Coyne ordered a slow right turn toward the coast. Before starting the turn, he did not look at the navigational chart and did not plot and fix the tanker's location. As noted earlier, no navigational fix had been taken since 1830, and the location of the vessel was not known. When the third mate arrived on the bridge around 2000, Captain Coyne directed him to plot a navigational fix, which was completed at 2004, eight minutes into the right turn. [JA 158 (¶81)]

When Captain Coyne saw the plotted fix on the navigational chart, he uttered an expletive and increased speed to "half ahead," which he increased ninety seconds

later to "full ahead." The tanker stranded at 2009 on a charted reef. [JA 159 (¶¶82-83)]

### *Procedural History*

Exxon brought suit to recover damages for the loss of the tanker. Exxon sought such damages under a variety of legal theories, including negligence, products liability, and express and implied warranties.<sup>6</sup> HIRI filed a third-party action against Bridon Fibres and Plastics, Ltd., Griffin Woodhouse, Ltd., and Werth Engineering, Inc., seeking contribution and indemnity.<sup>7</sup> All respondents raised affirmative defenses and asserted that it was the egregious misconduct of the vessel's captain that placed the tanker in danger and was the cause of the stranding.

Respondents<sup>8</sup> moved for bifurcation, arguing

1. that the issue of who was responsible for the breakout was independent of whether the breakout was a proximate cause of the stranding,
2. that, given (a) the extended lapse of time and distance between the breakout and the stranding and (b) Exxon's extraordinary

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<sup>6</sup> Exxon sued HIRI for negligence, express and implied warranties of safe berth, and implied warranty of workmanlike performance. Exxon sued Sofec, Inc. (who manufactured the SPM) for negligence, strict product liability, and breach of implied warranties of merchantability and fitness for purpose.

<sup>7</sup> The third-party defendants manufactured and supplied the chafe chain holding the tanker to the SPM. Werth was dismissed from the action before trial.

<sup>8</sup> Griffin filed the motion, which was joined by the other respondents and was opposed by Exxon. [JA 59]

mishandling of the vessel, there was a substantial question whether Exxon's conduct was a superseding cause, and

3. that trying this distinct and potentially case-dispositive issue at the outset could result in significant time and cost savings for the court and the parties.

The district court granted the motion and bifurcated the case, with phase I principally focused on determining the legal or proximate cause of the event of the stranding (*i.e.* whether the stranding was proximately caused by one or more of the following: (a) the breakout, (b) Exxon's post-breakout navigation, or (c) HIRI's post-breakout violations of a safe berth clause). See JA 71-74; JA 161 (¶4). The district court reserved the right to examine, in a phase II trial, the causes leading to the event of the breakout. [JA 73-74]

After a bench trial, the district court issued findings of fact<sup>9</sup> and conclusions of law, which may be summarized as follows:

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<sup>9</sup> References to findings made by the district court are to the joint appendix, by page and paragraph number (*e.g.*, JA \_\_\_\_ (¶\_\_\_\_)). Some fact findings appear in the section labeled "conclusions of law," but this does not change their true nature. Regardless of the label attached, they are, in actuality, questions of fact to be decided by the factfinder. See 9A Charles A. Wright & Arthur R. Miller, *FEDERAL PRACTICE & PROCEDURE* § 2579 at 537 (1995) ("an appellate court will regard a finding or conclusion for what it is, regardless of the label the trial court may have put on it"). See also *Mentor Insurance Co. (U.K.) Ltd. v. Norges Brannkasse*, 969 F.2d 506, 513 (2d Cir. 1993); *Weaver v. University of Cincinnati*, 970 F.2d 1523, 1536 (6th Cir. 1992), *cert. denied*, 507 U.S. 517 (1993); *Comdisco, Inc. v. United States*, 756 F.2d 569, 575 (7th Cir. 1985); *Turpen v. Missouri K.T.R.R.*, 736 F.2d 1022, 1026-27 n.5 (5th Cir. 1984); *Tri-Tron International v. Velto*, 525 F.2d 432, 435 (9th Cir. 1975). The district judge expressly provided for

1. The captain of Exxon's tanker was "grossly and extraordinarily negligent" in his handling and navigation of the tanker.
2. Such conduct was a superseding cause and the sole proximate cause of the stranding.
3. Such conduct was not a foreseeable consequence of the breakout.
4. The stranding of the tanker could have and would have been avoided if Captain Coyne had done any of the following -
  - (a) plotted and fixed the tanker's location in a timely and proper fashion,
  - (b) ensured that the bridge was properly manned,
  - (c) turned toward open ocean rather than toward the coast,
  - (d) backed out to open ocean rather than turning toward the coast.<sup>10</sup>

Thereafter, the district court entered judgment under Rule 54(b) denying Exxon's claims for all damages resulting from the stranding.<sup>11</sup> [JA 201-03]<sup>12</sup>

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possible imprecision in labeling. "To the extent that any findings of fact herein are more properly construed as conclusions of law, they shall be so construed; and to the extent any conclusions of law are more properly construed as findings of fact, they shall be so construed." [JA 141]

<sup>10</sup> The district court found that Captain Coyne could easily have taken any of the listed actions. See JA 153 (¶54); 156 (¶69); 158 (¶79).

<sup>11</sup> Unless otherwise stated, references to "Rule" are to the Federal Rules of Civil Procedure.

<sup>12</sup> Exxon's claims for damages associated with the breakout itself, *e.g.*, clean-up costs related to the oil spilled when the



Exxon appealed to the Ninth Circuit, which affirmed. The Ninth Circuit rejected Exxon's argument that the doctrine of superseding cause had been eliminated by this Court's decision in *Reliable Transfer*. 54 F.3d at 573-75. [JA 219-26]<sup>13</sup>

Rehearing was denied,<sup>14</sup> and this Court granted certiorari on November 22, 1995.

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### PRELIMINARY STATEMENT REGARDING SCOPE OF QUESTIONS PRESENTED

The bifurcation and due process issues addressed in Exxon's brief and the brief of the *Amicus* are not fairly embraced within the questions presented in Exxon's petition for writ of certiorari. This Court, therefore, need not address those issues. See Sup. Ct. R. 14.1; *Yee v. Escondido*, 503 U.S. 519 (1992). As these matters consume a significant portion of Exxon's brief, and virtually all of the brief of the *Amicus*, the HIRI respondents address them herein.

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cargo hoses broke, remain to be tried. Accordingly, the judgment was entered under Rule 54(b) as a judgment "upon less than all claims and as to less than all parties." [JA 201]

<sup>13</sup> The Ninth Circuit also held that the district court's decision to bifurcate was not an abuse of discretion but was "expeditious and appropriate in light of the circumstances." 54 F.3d at 576. [JA 226] The Ninth Circuit rejected Exxon's limited challenge under Rule 52, holding that the challenged findings were "well supported by the record." 54 F.3d at 579. [JA 233]

<sup>14</sup> See Appendix B to Exxon's petition for writ of certiorari.

### SUMMARY OF ARGUMENT

The central premise of Exxon's argument here is that superseding cause did not survive this Court's adoption of comparative fault in *Reliable Transfer*.<sup>15</sup> Unless Exxon is correct, which it is not, the trial court properly rendered judgment for respondents on its findings that the actions of the captain of the Exxon Houston following the breakout were "gross negligence," a "superseding cause" of the grounding of the vessel, and "unforeseeable" from the perspective of the respondents.

The "facts" set forth so extensively by Exxon in its brief are principally its own argumentative interpretation of conflicting evidence. Neither the questions presented in Exxon's petition for writ of certiorari nor indeed its brief on the merits contains any reference to Rule 52 or any claim that the trial court's extensive findings of fact were "clearly erroneous." This fact-intensive case is thus required to be determined on the basis of the trial court's findings, not Exxon's argument.<sup>16</sup>

In *Reliable Transfer*, this Court simply replaced the "divided damages" rule with the rule of "comparative fault." It did not explicitly or implicitly eliminate the then well-established doctrine of superseding cause. Furthermore, *Reliable Transfer* did not restrict in any respect the discretion of trial courts under Rule 42 to bifurcate causes. It did not compel trial judges under the aegis of due process protection to hear all evidence offered by all parties in a single, unphased trial under circumstances

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<sup>15</sup> *United States v. Reliable Transfer Co.*, 421 U.S. 397 (1975).

<sup>16</sup> Certain of the trial court's findings were challenged below. The Ninth Circuit upheld the trial court. The "two-court rule" is thus in play. See *Reliable Transfer*, 421 U.S. at 401 n.2.



where the trial court viewed the more efficient approach to determine first whether there was a "superseding cause," thereby eliminating the necessity of an otherwise unnecessary expenditure of the time and resources of the Court and the parties.

Nothing in *Reliable Transfer* necessitates the elimination of the doctrine of superseding cause or suggests, expressly or impliedly, that this would be the result of the decision. It was indeed urged upon the Court by the brief of the United States that this Country's maritime law could be brought into line with that of other nations without upsetting related rules of law or settled expectations. The Court quoted the following language from what it described as "a leading admiralty law treatise,"

"The abrogation of the [divided damages] rule would not, it seems, produce any disharmony with other branches of the maritime law, general or statutory."

421 U.S. at 410.<sup>17</sup>

Superseding cause and comparative fault coexist in harmony in various branches of admiralty law, in state law, and in the maritime law of other nations. Nothing was said in *Reliable Transfer* then, and no credible rationale is advanced now, supporting Exxon's theory that comparative fault and superseding cause are not administratively, practically, and in legal theory wholly compatible.

Exxon's reliance on *Italia Societa* is similarly misplaced. The facts are different. The issues are different. The expressions of policy on which Exxon places such

<sup>17</sup> Referencing Grant Gilmore & Charles L. Black, Jr., *THE LAW OF ADMIRALTY* § 7-20 at 531 (1975).

reliance neither fit the situation here nor present a concrete, applicable rule of law. *Italia Societa* simply has nothing to do with Exxon's warranty claims. Rather, it is the trial court's findings on foreseeability and avoidable consequences that are relevant and controlling here. Recognizing that "foreseeability" may be viewed differently under contract and tort, it is unquestioned that liability for contract breach does not extend beyond that which is foreseeable. It was not error, therefore, for the trial court to render judgment under Rule 54(b) on the finding that the grounding of the Exxon Houston was the result of the captain's gross negligence, was not a foreseeable event, and thus was not an event for which damages would be awarded, even assuming a breach of express or implied warranty. Similarly, the district court's finding that the stranding was a consequence that the tanker captain could have readily avoided also supports the entry of judgment denying recovery of stranding-related damages under the warranty claims.

A substantial portion of Exxon's brief and virtually all of the brief of the *Amicus* are devoted to the claim that the trial court's action in bifurcating the trial under Rule 42 was unlawful and that the resulting allocation of admissible evidence between the phased proceedings was a violation of Exxon's due process rights under the Fifth Amendment. The questions presented by Exxon in its petition for writ of certiorari and restated in its brief on the merits contain no reference to the Rule 42 bifurcation or to due process, nor are such issues fairly embraced within the questions presented in the petition. It is not, therefore, necessary for this Court to address these issues. Sup. Ct. R. 14.1(a). In any event, however, mischievous forces would be unleashed were this Court to hold, as

Exxon and the *Amicus* argue, that bifurcation in jurisdictions applying comparative fault is foreclosed by law and that any exclusion of evidence in phased proceedings would violate due process. The problems that would ensue in state and federal practice are readily apparent.

The judgment of the trial court was correct. It was supported by unchallenged findings of fact and was properly affirmed. No constitutional issues are implicated, and none is properly before this Court. The extraordinary misconduct of the tanker captain was found, as a matter of fact, to constitute a superseding cause and an unforeseeable event. These findings foreclose the relief Exxon seeks. Contrary to Exxon's argument, when *Reliable Transfer* sunk the divided damages rule, superseding cause did not go down with the ship.

## ARGUMENT

### I. THE DISTRICT COURT'S FINDINGS THAT EXXON'S MISCONDUCT CAUSED THE STRANDING CONCLUDE THE MATTER

A persistent theme running throughout Exxon's brief is the notion that there was something unjust about holding Exxon responsible for the loss of its own tanker. Not so.<sup>18</sup> The findings of the district court demonstrate that the stranding was solely the fault of Exxon. Exxon pleads for the assignment of blame to the breakout, but the force

<sup>18</sup> The district court concluded that "[i]t would be manifestly unjust to hold anyone legally responsible for the consequences of these acts other than Captain Coyne and his employer, Exxon." [JA 176 (¶46)]

associated with the breakout had run its course and was spent long before the stranding occurred.

Exxon makes no pretense in this Court of challenging the district court's findings under Rule 52 as "clearly erroneous" and is, therefore, bound by those findings. Undeterred, Exxon blithely recites its version of events even though that version is expressly contradicted by the findings of the district court. This ongoing attempt to deflect the blame surfaces in a variety of factual misstatements, which are addressed below.

#### A. Exxon's misstatement that the conduct of the vessel's captain was "heroic" but that the stranding was unavoidable

Exxon makes the incredible claim that the tanker captain "performed heroically" but could not prevent the stranding. That argument is absolutely and flatly repudiated by the express findings of the district court. Exxon's version of the event is as follows:

In our case, Captain Coyne and the crew of the HOUSTON performed heroically in trying to rescue the vessel and her seamen from the constant perils in which respondents' misconduct placed them. In the last few minutes, they were unable to save the ship. . . .

[Exxon br. 26] The district court's findings of fact tell a different story:

Captain Coyne acted negligently, unreasonably and in violation of the maritime industry standards. . . .

Captain Coyne's failure to plot fixes between 1830 and 2004 was grossly and extraordinarily negligent and in violation of the maritime industry standards. The danger of



stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON and plotting it on the navigational chart.

Captain Coyne's final starboard turn was grossly and extraordinarily negligent and in violation of the maritime industry standards because he commenced it without knowing the vessel's position.

[JA 170 (¶36) (omitting listing of particulars); 171 (¶¶37-38)] There is nothing heroic in gross negligence. Exxon's attempt to turn matters upside down should be rejected.

Exxon's suggestion that the stranding was unavoidable is also expressly refuted by the district court's findings. *See, e.g.*, JA 171 (¶37) ("danger of stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON"); JA 171 (¶39) ("danger of stranding could and would have been avoided had Captain Coyne backed out or ordered a left turn instead of attempting a right turn").

Contrary to the version that Exxon now advances, the district court summarized the situation as follows:

Although the breaking of the mooring chain imperilled [sic] the ship, the EXXON HOUSTON successfully avoided that peril. By 1830, the EXXON HOUSTON was heading out to sea and in no further danger of stranding. Only the grossly negligent actions of its master endangered the vessel further.

[JA 175 (¶46)] The conduct of the vessel's captain cannot be characterized as "heroic." Rather, it was the sole cause of the stranding.

**B. Exxon's attempt to create the mistaken impression that the tanker was in constant peril from the breakout to the stranding**

Throughout its brief, Exxon attempts to create the impression that the tanker was in constant and continuous peril from the time of breakout at 1728 through the time of the stranding more than two and one-half hours later. That impression is not true and is expressly contradicted by the trial court's findings.

Over two and one-half hours elapsed between the breakout and the stranding. During that period, Captain Coyne and his crew had ample time to consider the situation calmly and deliberately.

[JA 159 (¶85)] *See also* JA 175 (¶46) ("By 1830, the EXXON HOUSTON was heading out to sea and in no further danger of stranding.").

Exxon suggests that the cargo hose "posed a continuing danger" to the tanker, but, again, the district court found otherwise. [JA 150 (¶43)] As the Ninth Circuit noted below, "By 1803, the small assist vessel *Nene* was able, with the assistance of the *Houston*, to get control of the end of the second hose so that it was no longer a threat to the larger ship." 54 F.3d at 572. [JA 216] Exxon also contends that the tanker was "*in extremis*" and that Captain Coyne and his crew were "valiantly dealing with a whole succession of emergencies." [Exxon br. 26] Again, Exxon's version of the event is at odds with the district court's findings.

Exxon has argued that the EXXON HOUSTON was *in extremis* from the time of the breakout to the time of the stranding, and that Captain Coyne's conduct should be judged by that more lenient standard. As Captain Coyne's



decisions were made calmly, deliberately and without the pressure of an eminent peril, the *in extremis* rule cannot be applied in this case.

[JA 170 (¶¶33-34) (citations omitted)]

The district court's findings, reviewed and upheld by the Ninth Circuit, arrest any notion that the tanker was in constant peril.

**C. Exxon's misstatement that HIRI had "conceded" that its conduct was a substantial factor in causing the stranding**

Exxon mistakenly represents that respondents have "conceded" that their conduct was a "substantial factor" in causing the stranding. [Exxon br. 17] Exxon's apparent objective is to create the impression that HIRI agreed that its conduct played a significant role and was a proximate cause of the stranding. Neither HIRI nor any of the other respondents ever made any such concession.

In connection with the bifurcation below, the district court, on the suggestion of respondents, assumed that the breakout was a "cause in fact" of the stranding (*i.e.*, if the tanker had still been moored at the SPM, it would not have stranded). This does not equate to a "concession" that the breakout, or any respondent's responsibility for the breakout, was a "substantial factor" in bringing about the stranding.

Far from making any such concession, it has been respondents' position throughout that the stranding was caused solely by Exxon; the effects of the breakout more than two and one-half hours earlier had long since dissipated. The unalterable fact of the matter is that respondents played no part in Exxon's half-hearted attempt to anchor, no part in Exxon's decision to leave and ignore

the various positions of safety, and no part in Exxon's failure to plot and fix navigational positions. Exxon, not respondents, was at the helm when the final starboard turn was ordered.

**D. The notion that the tanker captain had "no reason" to know that the tanker was in the vicinity of a charted reef**

The most astonishing of Exxon's misstatements is its straight-faced assertion that Captain Coyne had "no reason" to know that the tanker was approaching the charted reef on which it ultimately stranded.

The Captain had no reason to anticipate that the tanker would be anywhere near the stranding area until the whole chain of incidents occurred after the chain parted.

[Exxon br. 15] That assertion strains credulity.

Perhaps the most important responsibility of a vessel's captain – especially in reef-laden coastal waters – is to know the vessel's location and to keep it off the rocks. Exxon's claim that its captain had "no reason" to know his location or the dangers surrounding his command cannot be taken at face value and is, once again, contradicted by the express findings of the district court. It was Captain Coyne's duty to know, and the only reason he did not was because he failed to plot and fix the tanker's position at any time between 1830 and 2004. [JA 152 (¶49)] The district court found as follows:

A prudent mariner would have fixed and plotted his vessel's position at least every 15 to 20 minutes in the situation in which the EXXON

HOUSTON found itself after 1830 on March 2, 1989.

[JA 152 (¶52)]

It was Captain Coyne's duty, as a prudent mariner, to plot positions "at least every 15 to 20 minutes." Instead, he let one and one-half hours go by without doing so and did not obtain a plotted fix until he was eight minutes into the injury-producing turn toward the coast. Captain Coyne testified that, rather than plotting fixes, he navigated by "parallel indexing," but that does not cure his misconduct. Again, from the district court's findings:

Parallel indexing is not a substitute for fixing the position of the vessel. Navigation by parallel indexing without plotting fixes is inherently dangerous and a violation of industry standards.

[JA 153 (¶56)] Exxon's own Navigation and Bridge Organization Manual condemns the practice.

Parallel indexing does not relieve the ship's officer of the duty to frequently plot the position of the ship on the chart by means of navigational fixes.

.....

FAILURE TO FOLLOW THE ABOVE PRECAUTIONS OR TO PROCEED WITHOUT RELIABLE CHARTED FIXES IS DANGEROUS. PARALLEL INDEXING IS A SUPPLEMENTAL NAVIGATIONAL TECHNIQUE ONLY.

[JA 153-54 (¶57) (capitalization in original)]

The district court rejected the notion that Captain Coyne had "no reason" to know. Instead, he was found grossly and extraordinarily negligent because he did not know.

Captain Coyne's failure to plot fixes between 1830 and 2004 was grossly and extraordinarily negligent and in violation of the maritime industry standards. The danger of stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON and plotting it on the navigational chart.

[JA 171 (¶37)]

The stranding occurred more than two and one-half hours after the breakout; the potential risks associated with the breakout had long since dissipated. During that time, Exxon was in full control of the tanker and made its decisions regarding anchoring, maneuvering, and navigation without input from or involvement of respondents. Accordingly, the district court properly found Exxon's conduct to be the sole cause of the stranding, and judgment was properly entered reflecting those findings. That judgment should be affirmed.

## II. RELIABLE TRANSFER IS WHOLLY CONSISTENT WITH THE RESULT BELOW

Exxon contends that the result below is inconsistent with this Court's decision in *Reliable Transfer*. That argument, however, finds no support in *Reliable Transfer* and is repudiated by decisions in admiralty cases across nearly every circuit. Contrary to Exxon's argument, the doctrine of superseding cause was firmly embedded in admiralty law prior to *Reliable Transfer* and remains so today.



**A. *Reliable Transfer* did not overrule or eliminate the doctrine of superseding cause**

Although Exxon contends that *Reliable Transfer* eliminated the doctrine of superseding cause, Exxon has not identified, and cannot identify, any textual support for that contention. Superseding cause was neither briefed, argued, nor addressed in *Reliable Transfer*. It was not even discussed in the Second Circuit's opinion. See 497 F.2d 1036 (2d Cir. 1974).

The holding of *Reliable Transfer* is narrow and precise:

In the present case we are called upon to decide whether this country's admiralty rule of divided damages should be replaced by a rule requiring, when possible, the allocation of liability for damages in proportion to the relative fault of each party.

....

We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. . . .

421 U.S. at 398, 411.

*Reliable Transfer* was not directed at superseding cause or any other aspect of legal causation. Rather, it was directed at the divided damages rule. Under that rule, regardless of the relative fault of the parties involved in a collision or stranding, liability for the resulting damages was divided equally among the parties at fault (i.e., the damages were aggregated and then apportioned equally). See 421 U.S. at 400 n.1. The adoption of comparative fault did not change superseding cause, and there was no reason to expect that it would.

Comparative fault and superseding cause are distinct and independent legal concepts. Superseding cause, of course, is part of proximate cause analysis, and both superseding and proximate cause focus on whether a party's conduct constitutes a legal cause of the injury. By contrast, neither the divided damages rule nor comparative fault is directed at legal cause, but, instead, both seek to allocate relative responsibility for damages in those circumstances in which collective liability has been determined to exist.

The independent nature of comparative fault and superseding cause has been noted by a leading admiralty treatise as follows:

Another aspect of proximate causation is whether an intervening or superseding cause relieves the defendant of liability. In some cases the defendant may be at fault, but the plaintiff or a third party may have committed an act which supersedes, in terms of cause, the fault of the defendant. The doctrine of superseding cause is thus properly applied to preclude direct causation; otherwise the court will apportion liability and damages according to comparative fault.

....

The doctrine of superseding cause is thus applied where the defendant's negligence in fact substantially contributed to the plaintiff's injury, but the injury was actually brought about by a later cause of independent origin that was not foreseeable. It is properly applied in admiralty cases.

1 Thomas J. Schoenbaum, *ADMIRALTY AND MARITIME LAW* § 5-3 at 165 (2d ed. 1994). Because the comparative-fault and superseding-cause inquiries are independent, there is no reason to expect that *Reliable Transfer's* adoption of



comparative fault would have any impact on the doctrine of superseding cause.

The United States' brief on the merits in *Reliable Transfer* reflects that careful consideration was given to the potential effect of replacing the divided damages rule with comparative fault and urges on the Court that no disruption of any other aspect of maritime law would follow.<sup>19</sup> The Solicitor General wrote as follows:

Adoption of the proportional fault rule by this Court to cover mutual fault collision cases in which the parties' respective degrees of fault can be determined would not create any inconsistencies or anomalies in the law generally, or defeat the intent of other related rules in American admiralty law. Neither would application of the proportional fault rule to cases such as the present upset settled expectations, encourage litigation or create confusion. It would, on the other hand, bring this important aspect of American admiralty law into line with the rules prevailing elsewhere in the world.

<sup>19</sup> The brief does not specifically discuss superseding cause but, instead, generally references "related rules in American admiralty law." Brief for the United States at 31. See also *id.* 31-36 (discussing the effect of adopting comparative fault on other areas of law; noting adoption of comparative fault in other maritime contexts and in state law). Judicial notice may be taken of pleadings previously filed with the court. See *E.I. Du Pont De Nemours & Co. v. Cullen*, 791 F.2d 5, 7 (1st Cir. 1986); *Green v. Warden, U.S. Penitentiary*, 699 F.2d 364, 369 (7th Cir.), cert. denied, 461 U.S. 960 (1983); *St. Louis Baptist Temple, Inc. v. FDIC*, 605 F.2d 1169, 1172 (10th Cir. 1979); *In re Phillips*, 593 F.2d 356 (8th Cir. 1979) (per curiam); *United States ex rel. Geisler v. Walters*, 510 F.2d 887, 890 n.4 (3d Cir. 1975).

Brief for the United States at 31.<sup>20</sup> The opinion itself reflects that, other than replacing the divided damages rule and its appendages (e.g. major/minor fault) with comparative fault, there was no intent to alter settled law.

"The abrogation of the [divided damages] rule would not, it seems, produce any disharmony with other branches of the maritime law, general or statutory."

421 U.S. at 410.<sup>21</sup>

Nothing in this Court's *Reliable Transfer* decision provides any support – explicit or implicit – to Exxon's contention that the doctrine of superseding cause was overruled and eliminated.

#### B. Superseding cause was part of admiralty jurisprudence long before *Reliable Transfer*

Exxon suggests that superseding cause is a stranger to general admiralty law.<sup>22</sup> This is not so. The doctrine of superseding cause was addressed in this Court's 1898 decision in *The G.R. Booth*, 171 U.S. 450 (1898). There, the Court held that, under the circumstances, the inflow of sea water following an explosion "was not an intermediate cause, disconnected from the primary cause, and self-operating; it was not a new and independent cause of damage; . . . " 171 U.S. at 460-61. The Court quoted the following from an even earlier case:

<sup>20</sup> See also *id.* 34-36 (referencing other maritime contexts employing comparative fault). Superseding cause is recognized and applied in those contexts. See section IID, *infra*.

<sup>21</sup> Quoting from Grant Gilmore & Charles L. Black, Jr., *THE LAW OF ADMIRALTY* § 7-20 at 531 (1975).

<sup>22</sup> See Exxon br. 20, 29.

One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened, of itself sufficient to stand as the cause of the misfortune, the other must be considered as too remote.

171 U.S. at 455 (quoting from *Louisiana Mutual Insurance Co. v. Tweed*, 74 U.S. (7 Wall.) 44, 52 (1869)).

Superseding cause was thus securely anchored in admiralty jurisprudence before *Reliable Transfer* was decided.<sup>23</sup>

**C. Cases after *Reliable Transfer* recognize the continued existence of the doctrine of superseding cause**

The post-*Reliable Transfer* decisions of the federal courts of appeals routinely recognized the continued existence of the doctrine of superseding cause in maritime law.<sup>24</sup>

<sup>23</sup> See *Williams v. Brasea, Inc.*, 497 F.2d 67, 74 (5th Cir. 1974); *United States v. Rothschild International Stevedoring Co.*, 183 F.2d 181, 182 (9th Cir. 1950); *United States v. Standard Oil Co. of California*, 495 F.2d 911, 916-17 (9th Cir. 1974); *Detyens Shipyards, Inc. v. Marine Industries, Inc.*, 349 F.2d 357, 358-59 (4th Cir. 1965); *United States v. DeVane*, 306 F.2d 182, 187 (5th Cir. 1962); *The Thomas J. Cleaver*, 52 F.2d 913, 915 (3d Cir. 1931). Cf. *Skibs A/S Gylfe v. Hyman-Michaels Co.*, 438 F.2d 803, 805-09 (6th Cir.), cert. denied, 404 U.S. 831 (1971).

<sup>24</sup> See, e.g., *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 652-53 (5th Cir. 1992); *Lone Star Industries, Inc. v. Mays Towing Co.*, 927 F.2d 1453, 1458-59 (8th Cir. 1991); *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991). Cf. *White v. Johns-Manville Corp.*, 662 F.2d 243, 250 (4th Cir. 1981); *Di Rago v. American Export Lines, Inc.*, 636 F.2d 860, 865-67 (3d Cir. 1981).

Exxon has mustered only one case in support of its argument that *Reliable Transfer* eliminated the doctrine of superseding cause. See Exxon br. 28, citing *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069 (11th Cir. 1985). Commentators acknowledge that *Hercules* can be given that reading,<sup>25</sup> so Exxon's position cannot be said to be bereft of any claim to judicial support, but the language used in *Hercules* speaks to ordinary intervening cause, not superseding cause.<sup>26</sup>

In his admiralty treatise, Professor Schoenbaum discusses *Hercules* and disagrees with the contention that superseding cause is somehow inconsistent with comparative fault.

One court has rejected the doctrine of superseding cause, however, on the grounds

<sup>25</sup> See, e.g., W. J. Miller, *Superseding Cause: Still A Viable Defense in Admiralty*, TUL. MAR. L.J. 210, 222-23 (1994); D.R. Owen & M.H. Whitman, Jr., *Fifteen Years Under Reliable Transfer: 1975-1990 Developments in American Maritime Law in Light of the Rule of Comparative Fault*, J. MAR. L. & COM. 1445, 1460-62 (1991); H.W.H. Lee, *Abandon Ship? The Need to Maintain a Consistency Between Causation in Admiralty and Common Law Tort*, 25 CREIGHTON L. REV. 1007, 1040-41 (1992).

<sup>26</sup> The language quoted by Exxon from *Hercules* states as follows:

Unless it can truly be said that one party's negligence did not in any way contribute to the loss, complete apportionment between the negligent parties, based on their respective degree of fault, is the proper method for calculating and awarding damages in maritime cases.

765 F.2d at 1075.



that it is inconsistent with the admiralty rule of comparative negligence which apportions liability in accordance with their respective degrees of fault. But the superseding cause doctrine can be reconciled with comparative negligence. Superseding cause operates to cut off the liability of an admittedly negligent defendant, and there is properly no apportionment of comparative fault where there is an absence of proximate causation.

1 Thomas J. Schoenbaum, *ADMIRALTY AND MARITIME LAW* § 5-3 at 166 (2d ed. 1994). Professor Schoenbaum takes the same position that nearly every court of appeals decision has – that the doctrine of superseding cause “is properly applied in admiralty cases.” *Id.* § 5-3 at 165.<sup>27</sup>

**D. Superseding cause and comparative fault are fully compatible and routinely co-exist in domestic and foreign jurisdictions**

Exxon argues that superseding cause and comparative fault are “irreconcilable” and cannot co-exist but offers no authority in support of its argument. Little wonder – superseding cause and comparative fault

<sup>27</sup> Cases decided in the Eleventh Circuit subsequent to *Hercules* appear to assume the continued existence of superseding cause as a viable admiralty doctrine in that circuit. See *Hiram Walker & Sons, Inc. v. Kirk Line*, 877 F.2d 1508, 1514 (11th Cir. 1989) (whether conduct of stevedore was superseding cause was a question of fact precluding summary judgment); *Edward Leasing Corp. v. Uhlig & Associates, Inc.*, 785 F.2d 877, 883 (11th Cir. 1986) (superseding cause argued but not found under the facts).

uniformly co-exist in federal admiralty law and also in state and foreign law. This attests to the easy compatibility of the doctrines.

Federal admiralty law itself reflects the complementary and harmonious nature of superseding cause and comparative fault. Those doctrines peacefully co-exist in a variety of maritime contexts, each of which involves comparative fault.<sup>28</sup> Perhaps Exxon’s position is that, notwithstanding the routine application of superseding cause in many other maritime contexts, it simply does not apply in stranding cases. But no reason has been offered for such disparate treatment, and it would be inconsistent with *Reliable Transfer’s* emphasis on uniformity. See 421 U.S. at 403-04, 407. See also *Lewis v. Timco, Inc.*, 716 F.2d 1425, 1428 (5th Cir. 1983) (en banc) (maritime law is “a

<sup>28</sup> In addition to cases cited at notes 23 and 24, see, e.g., *Saratoga Fishing Co. v. Marco Seattle, Inc.*, 69 F.3d 1432, 1442-43 (9th Cir. 1995) (maritime products liability claim); *Kirk Line*, 877 F.2d at 1513-15 (Carmack amendment and common law); *Trevino v. General Dynamics Corp.*, 865 F.2d 1474, 1489 (5th Cir.), cert. denied, 493 U.S. 935 (1989) (Death On The High Seas Act and admiralty claims); *Craine v. United States*, 722 F.2d 1523, 1525-26 (11th Cir. 1984) (Federal Tort Claims Act claim arising out of boating deaths); *Pastore v. Taiyo Gyogyo, K.K.*, 571 F.2d 777, 781-83 (3d Cir. 1978) (claim under stevedore’s warranty of workmanlike performance). Cf. *Jackson v. Pittsburgh S.S. Co.*, 131 F.2d 668, 669-70 (6th Cir. 1942) (Jones Act personal injury claim); *Hagemeyer Trading Co. v. St. Paul Fire & Marine Ins.*, 266 F. 14, 17 (2d Cir.), cert. denied, 253 U.S. 497 (1920) (marine insurance claim).



conceptual body whose cardinal mark is uniformity").<sup>29</sup> The uniform application of superseding cause in federal admiralty law refutes Exxon's attempt to read its demise into *Reliable Transfer*.

State law demonstrates that comparative fault and superseding cause are complementary doctrines that routinely exist side-by-side. Of the forty-six states that have adopted comparative fault,<sup>30</sup> at least forty-four recognize and apply superseding cause.<sup>31</sup> This uniformly-recognized co-existence of superseding cause and comparative fault under state law rebuts Exxon's protests regarding incompatibility.

Foreign law also refutes Exxon's "incompatibility" theory. Superseding cause and comparative fault co-exist in the law of other nations, including signatories to the Brussels Collision Liability Convention of 1910, which was referenced in *Reliable Transfer*.<sup>32</sup> See, e.g., *Reardon*

<sup>29</sup> *Timco, Inc.* noted that comparative fault applies to unseaworthiness claims, Jones Act personal injury claims, Death On The High Seas Act claims, longshoremen's claims under the Longshoremen's And Harbor Workers' Compensation Act, and maritime product liability claims. 716 F.2d at 1427-28.

<sup>30</sup> See Henry Woods, *COMPARATIVE FAULT* § 1:11 (2d ed. 1987 & Supp. 1995).

<sup>31</sup> Appendix A gathers cases reflecting that superseding cause is a viable doctrine under the comparative fault models of the various states. These cases are gathered, not for the application of superseding cause under the respective facts, but simply to show that superseding cause and comparative fault are not mutually exclusive but routinely co-exist. South Carolina and Oregon are the potential exceptions.

<sup>32</sup> In support of its decision to replace the divided damages rule with comparative fault, the Court noted that comparative

*Smith Line, Ltd. v. Australian Wheat Board*, A.C. 266 (H.L.) (1956) (on appeal from the High Court of Australia) (Australia); *Rushton v. Turner Brothers Asbestos Co.*, 1 W.L.R. 96 (1960) (England); *G.W. Grace & Co. v. General Steam Navigation Co.*, 2 K.B. 383 (1950) (same); *The Oropesa*, 1 All E.R. 211 (1943) (same); *S.S. Singleton Abbey v. S.S. Paludina*, A.C. 16 (1927) (same); *Bow Valley Husky (Bermuda) Ltd. v. St. John's Shipbuilding Ltd.*, 126 D.L.R.4th 1 (1995) (Canada);<sup>33</sup> *McKew v. Holland & Hannen & Cubitts (Scotland), Ltd.*, 3 All E.R. 1621 (1969) (Scotland).

Exxon professes to find something incompatible between comparative fault and superseding cause. No incompatibility exists. Whether under federal admiralty law, state law, or foreign law, the doctrines are uniformly regarded as compatible.

#### E. The district court's application of superseding cause did not "violate" *Reliable Transfer*

Exxon takes the position that, in two respects, the application of superseding cause below "violated" *Reliable Transfer*. First, Exxon argues that, under *Reliable Transfer*, respondents' faults must be compared with Exxon's faults. See Exxon br. 27. The flaw in that argument is that *Reliable Transfer* has no such requirement. *Reliable Transfer* requires only a comparison of faults that are a legal cause of the incident. To argue otherwise would negate a necessary element of the tort itself.

fault had been adopted by most other maritime nations. 421 U.S. at 403-04.

<sup>33</sup> In *Bow Valley*, an application is pending seeking leave to appeal to the Supreme Court of Canada (Court file No. 24855).

Unless the "fault" constitutes a legal cause, it does not figure in the comparative fault calculus.<sup>34</sup>

If Exxon retreats and argues that every fault that is a cause in fact must be compared, that position too is indefensible. The potential causes in fact are innumerable. The construction of the vessel, its fueling, its departure from Alaska for the voyage to Oahu – all these constitute causes in fact – *i.e.*, but for their occurrence the vessel could not have been run aground. However, no one would suppose that these factors should be included under a comparative fault analysis. In comparative fault analysis, the conduct to be compared must constitute a legal cause of the harm.<sup>35</sup>

The second "violation" of *Reliable Transfer* that supposedly results from the district court's application of superseding cause is reflected in Exxon's "deterrent effect" argument. See Exxon br. 26-27. "Deterrent effect," of course, cannot really be said to be a holding of *Reliable Transfer* and does not constitute an enforceable legal standard. Neither this Court nor any other sits to enforce illusory standards like "deterrent effect" or "best situated." There is no reason to believe that *Reliable Transfer* (or any other decision) seeks to impose a "deterrent

<sup>34</sup> Any argument that legal cause and comparative fault must be analyzed simultaneously in the same proceeding is addressed in response to Exxon's bifurcation argument. See section V, *infra*.

<sup>35</sup> Accord 1 Thomas J. Schoenbaum, *ADMIRALTY AND MARITIME LAW* § 5-3 at 166 (2d ed. 1994) ("there is properly no apportionment of comparative fault when there is an absence of proximate causation"). See also Grant Gilmore & Charles L. Black, Jr., *THE LAW OF ADMIRALTY* § 7-5 at 494 (1975) ("the 'fault' that is to produce liability must be not mere fault in the abstract, but fault that is a contributory cause of the collision").

effect" on a party whose conduct is not a legal cause of any injury. Again, any such argument is inconsistent with the underlying cause of action itself.

The "factual" basis of Exxon's "deterrent effect" argument is equally flawed. Exxon argues that respondents were "best situated" to prevent the stranding, but the district court's unchallenged findings conclusively establish the contrary. The district court found that it was Exxon's conduct that caused the stranding and that Exxon was "best situated" to prevent the stranding. See JA 152-59; 171 (¶¶37-39); 173-76 (¶¶44-46). The stranding was not the result of the breakout. Any dangers associated with the breakout had passed.

The harm that the breakout risked was that a disabled ship would have been driven onto the shore before it could reach safety. The EXXON HOUSTON had reached a safe position and only the gross negligence of its master put it into further danger.

[JA 174 (¶44a)] See also JA 175 (¶46).

Contrary to Exxon's argument, no "violation" is created by the district court's finding of superseding cause here. *Reliable Transfer* is wholly compatible with the doctrine of superseding cause, and the doctrine is routinely applied in a wide variety of maritime contexts. Its application is compelled under the facts and circumstances present here.



### III. *ITALIA SOCIETA* DOES NOT SUPPORT EXXON'S WARRANTY CLAIMS

*Italia Societa*<sup>36</sup> involved a wholly different set of facts and issues than those involved here. "The issue presented is whether the warranty is breached where the stevedore has nonnegligently supplied defective equipment which injures one of its employees during the course of stevedoring operations." 376 U.S. at 315-16. That case dealt with the nature of a stevedore's duty under an implied warranty. It did not address causation or the recoverability of damages under the circumstances present here.

In its effort to bring this case within the purview of *Italia Societa*, Exxon again resorts to its "deterrent effect" argument. Exxon argues (1) that *Italia Societa* "establishes the policy of placing the risks of loss on the persons who are best situated to prevent injuries" and (2) that HIRI, not Exxon, was "best situated." [Exxon br. 35] Setting aside the difficulties with Exxon's first premise (and whether such a broad statement can properly be construed as *Italia Societa*'s holding), the second premise is flatly precluded by the district court's findings of fact, which establish that Exxon caused the stranding and was "best situated" to prevent it. See JA 152-59; 171 (¶¶37-39); 173-76 (¶¶44-46). The language quoted by Exxon from *Italia Societa* speaks in terms of "injury-producing and defective equipment," but the "injury producer" here was Exxon's own conduct - the grossly negligent handling of the vessel.

<sup>36</sup> *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Co.*, 376 U.S. 315 (1964).

Exxon attacks the district court's refusal to award damages for the loss of its tanker under a breach of warranty theory, arguing that the extraordinary misconduct of its tanker captain relates to the recoverability of damages, but not to liability.

Negligence of a shipowner, in whose favor the warranty runs, may reduce the damages for which the warrantor is liable to the extent that such negligence constitutes the failure to mitigate damages; it does not defeat liability for breach of contract.

[Exxon br. 35] But what Exxon says should happen is precisely what did happen here. The judgment entered by the district court simply denied Exxon recovery for the stranding-related damages that, under the district court's unchallenged findings, were not a foreseeable consequence of the breakout and were easily avoidable by Exxon.

The principal focus below was on legal causation and superseding cause. But the findings made by the district court also support the entry of judgment denying recovery of stranding-related damages under Exxon's warranty theory. Two distinct contract doctrines applicable in admiralty law compel this. The first is the doctrine of avoidable consequences, often referred to as mitigation. Professor Corbin described the doctrine as follows:

Since the purpose of the rule concerning damages is to put the injured party in as good a position as he would have been put by full performance of the contract at the least necessary cost to the defendant, the plaintiff is never given judgment for damages for losses that he could have avoided by reasonable effort without risk of other substantial loss or injury.



5 Arthur L. Corbin, CORBIN ON CONTRACTS § 1039 at 241 (1964). Dean Farnsworth, the Reporter for the RESTATEMENT (SECOND) OF CONTRACTS, states the rule as follows:

A court ordinarily will not compensate an injured party for loss that that party could have avoided by making efforts appropriate, in the eyes of the court, to the circumstances.

III E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 12.12 at 219 (1990).<sup>37</sup>

The doctrine of avoidable consequences has been discussed and applied in a variety of maritime contexts. See, e.g., *Pennzoil Producing Co. v. Offshore Express, Inc.*, 943 F.2d 1465, 1474-1476 (5th Cir. 1991) (vessel ruptured pipeline which resulted in loss of gas well); *Delta Transload, Inc. v. M/V Navios Commander*, 818 F.2d 445, 452 (5th Cir. 1987) (damages for loss of mooring buoy and chain); *Federal Insurance Co. v. Sabine Towing & Transportation Co.*, 783 F.2d 347, 350 (2d Cir. 1986) (cargo damage); *Hagerty v. L&L Marine Services, Inc.*, 788 F.2d 315, 319 (5th Cir. 1986) (Jones Act); *Southport Transit Co. v. Avondale Marine Ways, Inc.*, 234 F.2d 947, 951-54 (5th Cir. 1956) (loss of tug by fire).

Here, the district court found that Exxon could have avoided the stranding by means that were not only readily available but were, in fact, required by Exxon's own company guidelines and by longstanding maritime custom and practice.

<sup>37</sup> See also 11 Samuel Williston, A TREATISE ON THE LAW OF CONTRACTS § 1353 (3d ed. 1968); Howard O. Hunter, MODERN LAW OF CONTRACTS ¶14.07 (rev. ed. 1993); RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981).

Captain Coyne's failure to plot fixes between 1830 and 2004 was grossly and extraordinarily negligent and in violation of the maritime industry standards. The danger of stranding could and would have been avoided by regular fixing of the position of the EXXON HOUSTON and plotting it on the navigational chart.

[JA 171 (¶37)]<sup>38</sup>

Backing out to sea or turning to port were viable and safe alternatives to the starboard turn. These options would have taken the EXXON HOUSTON away from the coast rapidly, allowing Captain Coyne to leave the bridge and attend to AB Denton.

[JA 158 (¶79)]<sup>39</sup> Captain Coyne not only failed to take steps to avoid danger, he affirmatively placed the vessel in danger and drove it onto the reef. Accordingly, under the doctrine of avoidable consequences, Exxon cannot recover damages for the stranding under any theory.

The second contract doctrine that forecloses recovery by Exxon for stranding-related damages is the doctrine of foreseeability. The RESTATEMENT puts the rule as follows:

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.

(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach

<sup>38</sup> See also JA 156-57 (¶¶69-71).

<sup>39</sup> See also JA 171 (¶39) ("The danger of stranding could and would have been avoided had Captain Coyne backed out or ordered a left turn instead of attempting a right turn.").

- (a) in the ordinary course of events, or
- (b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.

RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981).<sup>40</sup>

Here, in the words of the RESTATEMENT, it cannot be said that the stranding "follows from the breach in the ordinary course of events" or that the stranding occurred "as a result of special circumstances beyond the ordinary course of events that [HIRI] had reason to know." It was not foreseeable that the vessel's captain, having reached a position of safety and having complete control of the vessel, would make a turn toward the coast and drive the ship onto a charted reef. Similarly, it was not foreseeable that the vessel's captain would let more than an hour and a half pass without any attempt to fix the vessel's location or would make no effort to determine the vessel's location before making a dangerous turn toward the coast.

The grossly negligent conduct of Captain Coyne was not a foreseeable consequence of any alleged failure associated with the breakout. The district court's findings, while in the context of tort law, are explicit in this regard and are equally preclusive of any contract claim.

Captain Coyne's attempt to turn the ship towards the coast was extraordinarily negligent and not a foreseeable consequence of the breakout.

<sup>40</sup> See also 5 Arthur L. Corbin, CORBIN ON CONTRACTS § 1007 (1964); III E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 12.14 (1990); 11 Samuel Williston, A TREATISE ON THE LAW OF CONTRACTS § 1344 (3d ed. 1968).

The decision to make the final turn was made independently of the breakout and was not foreseeable.

[JA 175 (¶45(b); ¶45(c)) (citations omitted)]

It is also noteworthy that the damages sought by Exxon failed the foreseeability test under proximate cause, which is more expansive than the foreseeability requirement for contract damages.

[T]he requirement of foreseeability is a more severe limitation of liability than is the requirement of substantial or "proximate" cause in the case of an action in tort or for breach of warranty.

RESTATEMENT (SECOND) OF CONTRACTS § 351 comment a at 136 (1979).

The rules of foreseeability set contract cases apart from cases in tort. In a contract case, a plaintiff's recoverable damage must have been a foreseeable result of the breach of the contract. It is not enough to show that the damage followed naturally from the breach, which is sufficient proof in a tort case. There must be a more direct connection between the damage and the risks actually assumed by the parties when they entered into the agreement.

Howard O. Hunter, MODERN LAW OF CONTRACTS ¶ 14.03[3][a] (rev. ed. 1993). See also III E. Allan Farnsworth, FARNSWORTH ON CONTRACTS § 12.14 at 243 (1990). Here, under the district court's findings, the stranding was not foreseeable under the relaxed proximate cause standard. Therefore, it cannot be foreseeable under the more stringent contract standard.

Because the stranding of the vessel was not a foreseeable consequence of any alleged breach by HIRI and was, instead, a consequence that Exxon could have readily



avoided, the district court properly refused to permit Exxon to recover stranding-related damages from HIRI. Basic contract law, applicable under the district court's unchallenged findings, prohibits such a recovery.

#### IV. THE DISTRICT COURT'S FINDINGS OF FACT ARE BINDING UNDER RULE 52 AND SUPPORT THE ENTRY OF JUDGMENT BELOW

After taking evidence for the better part of three weeks, including conflicting testimony from expert witnesses, the district court made specific findings regarding controlling issues of fact – gross negligence, superseding cause, foreseeability, avoidability, etc. Each of these matters is a question for the factfinder, subject to review under Rule 52's clearly erroneous standard.<sup>41</sup> These findings fully support the judgment entered below.

Exxon mounted only a limited Rule 52 challenge in the Ninth Circuit,<sup>42</sup> and even that limited challenge has been abandoned in this Court.<sup>43</sup> There has been no

<sup>41</sup> See, e.g., *Milwaukee & St. P. Ry. v. Kellogg*, 94 U.S. 469, 474-75 (1877) (superseding cause); *Perlmutter v. United States Gypsum Co.*, 4 F.3d 864, 872 (10th Cir. 1993) (same); *Springer v. Seamen*, 821 F.2d 871, 876-77 (1st Cir. 1987) (same); *Grover Hill Grain Co. v. Baughman-Oster, Inc.*, 728 F.2d 784, 791-92 (6th Cir. 1984) (same); *Bergerco, U.S.A. v. The Shipping Corporation of India, Ltd.*, 896 F.2d 1210, 1212 (9th Cir. 1990) (foreseeability); *Redman v. County of San Diego*, 924 F.2d 1435, 1445 (9th Cir. 1991), cert. denied, 502 U.S. 1074 (1992) (gross negligence); *Rogers v. Gracey-Hellums Corp.*, 442 F.2d 1196 (5th Cir. 1971) (same).

<sup>42</sup> See 54 F.3d at 579. [JA 233]

<sup>43</sup> The words "clearly erroneous" are not found in Exxon's brief, and no Rule 52 challenge is within the scope of the questions presented in Exxon's petition for certiorari. Any attempt to interject such a challenge now, therefore, would be improper under Sup. Ct. R. 14.1.

careful analysis by Exxon of the evidence in light of the clearly erroneous standard of Rule 52; nothing has been said to demonstrate that the district court's account of the evidence was not "plausible" or that the district court adopted an "impermissible view" of the evidence. This is the burden that any such challenge must meet. See *Amadeo v. Zant*, 486 U.S. 214, 223 (1988); *Anderson v. City of Bessemer City*, 470 U.S. 564, 574 (1985). Exxon is bound, therefore, by the district court's findings of fact.<sup>44</sup>

Notwithstanding its failure to raise a Rule 52 challenge in this Court, Exxon disregards the district court's explicit findings and argues, among other things, that respondents should have foreseen the extraordinary misconduct of the tanker captain and, therefore, that such misconduct cannot constitute a superseding cause.<sup>45</sup> This cavalier treatment of the district court's findings appears to be an oblique invitation by Exxon for this Court to reweigh the evidence and re-try issues laid to rest below. As reflected in its Rule 52 jurisprudence, this Court does not sit for that purpose.

#### A. Appellate review of findings under Rule 52

*Bessemer City* states the controlling principle that, under Rule 52, the factfinder's choice between permissible views of the evidence cannot constitute clear error. 470 U.S. at 573-74. Accord *Zant*, 486 U.S. at 223, 225-26. The policy and rationale mandating deference to the trial court as the finder of fact has been stated as follows:

<sup>44</sup> Although unwilling to engage in a direct Rule 52 challenge, Exxon is apparently willing to impugn the competence of the district judge. See Exxon br. 4 n.4.

<sup>45</sup> See Exxon br. 29.



The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

*Bessemer City*, 470 U.S. at 574-75.

This Court also foreclosed any notion that "ultimate" and "subsidiary" facts should be treated differently and held that, in applying the "clearly erroneous" standard, no distinction is to be made between "ultimate" findings and "subsidiary" findings.

Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

*Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

The foregoing controlling principles preclude any attempt by Exxon to re-visit the facts in this Court.

**B. Exxon's arguments regarding superseding cause do not undermine the district court's explicit findings**

Exxon's brief contains a variety of attacks regarding superseding cause, but none undermines the district

court's finding that Exxon's conduct was the superseding cause of the stranding. First, Exxon attacks a strawman of its own creation by arguing that "[w]hat the Ninth Circuit has actually done is to resurrect contributory negligence as a complete defense to liability for maritime negligence and strict products liability by dubbing the defense 'superseding cause.' " [Exxon br. 32] This, of course, is simply not true. The doctrine of contributory negligence played no part in either court below. Superseding cause and contributory negligence are distinct and independent doctrines.<sup>46</sup> And, as demonstrated in section III above, the doctrine of superseding cause is firmly embedded in maritime jurisprudence.

Exxon also seeks to sow confusion by arguing that "the Ninth Circuit's conclusion that the Captain's negligence was the 'sole' cause of the stranding is inconsistent with the respondents' admission that their own conduct was a cause in fact of the casualty." [Exxon br. 32] This also is an exercise in misdirection. There is, of course, no inconsistency between the finding that Exxon's misconduct was the sole proximate cause and the notion that the breakout was a cause in fact. Legal causation and physical causation are, of course, different concepts. The district court found that the conduct of Exxon's tanker captain was the sole proximate cause, and that finding has not been challenged here.

The force associated with the breakout had run its course and was spent before the stranding occurred. This case does not involve a vessel "cast adrift" in a confining river and helpless before its forces. Rather, when the

<sup>46</sup> See RESTATEMENT (SECOND) OF TORTS § 440 (superseding cause); §§ 463 and 465 (contributory negligence).

vessel broke its moorings, it was fully manned and fully operational. In scant minutes, the tanker was under power and moving purposefully under the guidance of its captain. Within 12 minutes, the tanker had reached a safe anchorage,<sup>47</sup> and all dangers associated with the breakout had evaporated. Exxon was in control. That control continued as Captain Coyne decided not to anchor the ship at its safe, 1747 location and directed the ship through a series of maneuvers and out toward open ocean. Exxon was still in control at 1956 when the order was given not to back out to sea, not to turn to port, but to turn to starboard – toward the coast. Captain Coyne directed the blind right turn even though no navigational positions had been fixed and plotted since 1830. The district court found that these decisions were unforeseeable and were made independently by Exxon.<sup>48</sup>

Exxon's reference to Section 442B of the RESTATEMENT (SECOND) OF TORTS is unavailing. Here, implicit in the district court's findings is the conclusion that the breakout was not a substantial factor in causing the stranding. Instead, the stranding was caused by the conduct of Captain Coyne. Section 442B is also inapplicable in view of the district court's finding that the stranding was not within the scope of any risk associated with the breakout.

The harm that the breakout risked was that a disabled ship would have been driven onto the shore before it could reach safety. The EXXON HOUSTON had reached a safe position and only the gross negligence of its master put it into further danger.

<sup>47</sup> See JA 148 (¶35).

<sup>48</sup> See JA 175 (¶45(b-c)).

... The harm resulting from the final turn was the stranding at a point far from the SPM. The harm that could have resulted from the breakout was a grounding before the ship regained control. These harms are different in kind.

[JA 174 (¶44(a); 175 ¶45(a))]<sup>49</sup>

The district court's findings reflect that the conduct of Captain Coyne was unforeseeable, grossly and extraordinarily negligent, and a superseding cause of the stranding. Similarly, the district court found that the stranding was an avoidable consequence and that Exxon's conduct was the sole proximate cause. These findings, and the others made by the district court, support the judgment entered below.

#### V. BIFURCATION DOES NOT RAISE ISSUES OF CONSTITUTIONAL MOMENT AND WAS A PROPER EXERCISE OF DISCRETION BY THE TRIAL JUDGE IN ADMINISTERING HIS DOCKET

As is noted preliminarily, issues relating to bifurcation are not within the scope of the questions presented in Exxon's petition for certiorari and are not properly before this Court. However, in view of the treatment by Exxon and the *Amicus* in their respective briefs, a response is thought appropriate.

<sup>49</sup> Apparently, Exxon seeks to expansively define the "harm" as stranding generally, without regard to when, where, or how the stranding takes place. Under Exxon's definition, if Captain Coyne had turned to port rather than toward the coast, circled the island of Oahu (or even returned to Alaska), and then run aground, that grounding would be a "harm" associated with the breakout. The district court's analysis makes much more sense and reflects the reality of the situation.



Exxon argues that the district court's decision under Rule 42 to bifurcate proceedings and conduct a separate trial on proximate cause violates the Fifth Amendment. To the contrary, the bifurcation order was proper in every respect. It resulted in substantial savings of judicial resources and significantly reduced the expenditure of time and money by the parties. The parties were fully heard on an independent, case-dispositive issue. There was no sacrifice of fundamental fairness, and due process considerations were not compromised in any respect. Exxon's protests to the contrary cannot withstand scrutiny.

The fundamental premise of Exxon's due process argument is that it is *per se* improper to conduct a separate trial of proximate or legal causation. Exxon has failed to demonstrate, or even explain, why this should be so, and the sweeping implications of Exxon's argument compel its rejection. If Exxon's suggestion were adopted, it would change trial practice throughout the country. Every trial court – state and federal – would be constitutionally disabled from severing the issue of proximate cause for separate trial. And, if proximate cause is to be treated as inherently unseverable, what of other elements of common law claims and defenses?

The rule proposed by Exxon and the *Amicus* is problematic for complex multi-party litigation. If, as the *Amicus* argues, "the trial court should always examine the conduct of all parties," the resulting litigation tactics are apparent. Parties against whom a remote claim can be asserted will be joined, and, unless they can prevail under Rule 56 (which is doubtful given the fact-intensive nature of foreseeability, proximate cause, and comparative fault), their only choices will be to pay the plaintiff's

substantial "exit" price or to bear the crushing expense of protracted litigation. With bifurcation unavailable under the Exxon rule (at least with respect to legal causation), the hands of the trial judge would be tied.

*Reliable Transfer* did not impose any requirement that a full trial for all parties on all aspects of a collision/stranding case be tried in a single proceeding. Nothing in comparative fault doctrine gives rise to any such requirement either. Neither Exxon nor the *Amicus* has stated why the trial judge's discretion under Rule 42(b) should be *per se* circumscribed in this manner.

**A. Exxon has been fully heard on legal causation, and, therefore, bifurcation did not prejudice Exxon in any respect**

Exxon has never pretended that it was not fully heard on legal causation, and a review of the evidence that Exxon "would have offered" reveals that this evidence has no bearing on either superseding cause or proximate cause. Exxon describes its "offer of proof" as follows:

Exxon offered to prove that the HIRI respondents knew that the berth was unsafe before the HOUSTON sailed to Hawaii. Before the HOUSTON incident, two different tankers had broken away from the SPM. The HIRI respondents had been repeatedly advised by their own experts that breakaways were inevitable; they nevertheless had removed the quick release couplings with which the cargo hoses had been initially equipped, and they failed to replace them after their own experts advised them the hoses were dangerously unsafe without such releasing devices; HIRI had been advised that



the mooring was unsafe unless particular additional safety measures were taken. The HIRI respondents ignored all the warnings, installed none of the safety devices and took none of the other recommended safety measures.

[Exxon br. 7] Nothing set out in the foregoing has anything to do with whether Captain Coyne's conduct was, or was not, a superseding cause or a foreseeable event, or whether the breakout itself was, or was not, a proximate cause. The allegations detailed above relate to whether a breach occurred, but they are completely unrelated to legal causation, which was the subject of the phase I bifurcated proceeding.

Exxon's "offer of proof" is completely unrelated to the issue of legal causation, which was before the district court. Accordingly, the exclusion of that evidence from the phase I trial did not prejudice Exxon and cannot constitute a violation of the Fifth Amendment. The exclusion of irrelevant evidence is not error, nor does every evidentiary ruling implicate due process.

**B. By its very nature, superseding cause is an independent and distinct issue that is appropriate for separate trial**

The RESTATEMENT recognizes that superseding cause, by its very nature, is particularly well-suited for separate trial under Rule 42.

A superseding cause relieves the actor from liability, irrespective of whether his antecedent negligence was or was not a substantial factor in bringing about the harm. Therefore, if in looking back from the harm and tracing the sequence of events by which it was produced, it is found that a superseding cause has operated, *there is*

*no need of determining whether the actor's antecedent conduct was or was not a substantial factor in bringing about the harm.*

RESTATEMENT (SECOND) OF TORTS § 440 comment b at 465 (1965) (emphasis added). The RESTATEMENT simply reflects the common sense of the matter – a determination that a superseding cause exists obviates the need for further proceedings on liability. This is precisely what occurred here.

The separate trial of causation has been ordered and affirmed in both admiralty and non-admiralty cases where, as here, it appeared that a determination of causation would likely resolve the entire case. See *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988); *In re Beverly Hills Fire Litigation*, 695 F.2d 207 (6th Cir. 1982); *Hasbro Ind. v. St. Constantine*, 1980 A.M.C. 1324 (D. Hawaii 1980), *aff'd*, 705 F.2d 339 (9th Cir. 1983); *Adelson v. United States*, 523 F. Supp. 459, 461 (N.D. Cal. 1981).<sup>50</sup> See also *Johnson v. Washington Metropolitan Area Transit Authority*, 764 F. Supp. 1568, 1581 (D.D.C. 1991) (in considering admissibility of drug test evidence, the trial court stated that conducting a separate trial of proximate cause would obviate potential prejudicial effect).

Legal causation is a distinct and independent issue that is appropriate for separate trial under Rule 42. Here, as the district court noted, that issue was potentially case-dispositive. [JA 71-75] Accordingly, it was well within the district court's discretion to order a separate trial on proximate cause.

<sup>50</sup> The bifurcation in *Adelson* was agreed to by the parties, but *Adelson* nonetheless reflects the propriety of resolving legal causation as a separate issue.

**C. Gasoline Products does not support Exxon's position**

In attacking the bifurcation order, Exxon proffers *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494 (1931), as its centerpiece. *Gasoline Products* was a Seventh Amendment case. The issue involved was whether, on remand, damages alone could be tried to a new jury or whether both liability and damages would need to be heard. This Court held that, without evidence on liability issues, the jury would not have the information needed to decide the damages issues. 283 U.S. at 499-500. Because a determination of damages could not be made without evidence relating to contract liability, the Court held that the damages and liability issues could not be tried separately. *Id.* at 500.

The situation is much different here. The bifurcation order did not contemplate two different factfinders. More importantly, issues relating to legal causation are separate and distinct from those relating to comparative fault, and evidence related to comparative fault is not required to decide legal causation.

**D. Bifurcation is an important case management tool in the district courts and was properly employed below**

Exxon appears to regard bifurcation as a suspect procedure. However, it is plainly authorized under Rule 42(b) and constitutes an important tool for district judges to use in administering their docket.

Rule 42 provides two wholly different procedures that are designed to achieve a common end. That objective is to give the court broad discretion to decide how cases on its docket are

to be tried so that the business of the court may be dispatched with expedition and economy while providing justice to the parties. . . . These procedures have proven extremely useful over the years; this has been particularly true ever since the tremendous growth in multi-party and multi-claim litigation in the federal courts.

9 Charles A. Wright & Arthur R. Miller, *FEDERAL PRACTICE & PROCEDURE* § 2381 at 427 (1995).<sup>51</sup>

Here, in view of the extraordinary lapse of time between the breakout and the stranding and the extraordinary misconduct of the tanker captain, it was readily apparent that the issue of legal causation was an independent and potentially case-dispositive issue. The determination of that issue had the potential for avoiding protracted pretrial and trial proceedings on other issues and also for facilitating settlement. See JA 72-73. These are the precise circumstances that call for a separate trial under Rule 42(b).

If a single issue could be dispositive of the case or is likely to lead the parties to negotiate a settlement, and resolution of it might make it unnecessary to try the other issues in the litigation, separate trial of that issue may be desirable

<sup>51</sup> "Rule 42(b) therefore acts as a counterbalance to the joinder rules by giving the court virtually unlimited freedom to try the issues in whatever way trial convenience requires. An exhaustive study of the practical operation of the rule concludes: 'on the whole the separate trial has proved a very flexible and useful instrument for preventing confusion, avoiding prejudice, and providing a convenient method of disposing of litigation as fairly and quickly as possible. The rule serves its purpose in modern pleading.'" *Id.* § 2387 at 472.

to save the time of the court and reduce the expense of the parties.

*Id.* § 2388 at 476.

### CONCLUSION

For the foregoing reasons, HIRI respectfully submits that the judgment of the Ninth Circuit should be affirmed.

Respectfully submitted,

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### APPENDIX A

I. Cases reflecting that superseding cause exists under the circumstances present in that case or that the evidence warrants submitting the issue of superseding cause to the factfinder:

Alaska	<i>Lake v. Construction Machinery, Inc.</i> , 787 P.2d 1027 (Alaska 1990)
Arkansas	<i>Carroll Elec. Cooperative Corp. v. Carlton</i> , 892 S.W.2d 496 (Ark. 1995)
California	<i>Brewer v. Teano</i> , 47 Cal. Rptr.2d 348 (Cal. App. 2 Dist. 1995)
Connecticut	<i>Heritage Village Master Ass'n, Inc. v. Heritage Village Water Co.</i> , 622 A.2d 578 (Conn. App. 1993)
Delaware	<i>Duphily v. Delaware Elec. Coop., Inc.</i> , Del. Supr., 662 A.2d 821 (Del. 1995)
Florida	<i>Palm Beach County Bd. of Com'rs v. Salas</i> , 511 So.2d 544 (Fla. 1987)
Georgia	<i>Roseberry v. Brooks</i> , 461 S.E.2d 262 (Ga. App. 1995); <i>Gafford v. Duncan</i> , 436 S.E.2d 78 (Ga. App. 1993)
Hawaii	<i>Leary v. Poole</i> , 705 P.2d 62, 66 (Hawaii App. 1985)
Illinois	<i>Benner v. Bell</i> , 602 N.E.2d 896 (Ill. App. 4 Dist. 1992)
Indiana	<i>Hooks SuperX, Inc. v. McLaughlin</i> , 642 N.E.2d 514 (Ind. 1994)
Kansas	<i>Barkley v. Freeman</i> , 827 P.2d 774 (Kan. App. 1992)
Louisiana	<i>Bourne v. Seventh Ward General Hospital</i> , 546 So.2d 197 (La. App. 1 Cir. 1989)



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Massachusetts	<i>Solimene v. B. Grauel &amp; Co., K.G.</i> , 507 N.E.2d 662 (Mass. 1987)
Minnesota	<i>Hafner v. Iverson</i> , 343 N.W.2d 634 (Minn. 1984)
Mississippi	<i>O'Cain v. Harvey Freeman &amp; Sons, Inc.</i> , 603 So.2d 824 (Miss. 1991); <i>Foster by Foster v. Bass</i> , 575 So.2d 967 (Miss. 1990)
Missouri	<i>Buck v. Union Elec. Co.</i> , 887 S.W.2d 430 (Mo. App. 1994)
Nevada	<i>Doud v. Las Vegas Hilton Corp.</i> , 864 P.2d 796 (Nev. 1993)
New Jersey	<i>Davis v. Brooks</i> , 655 A.2d 927 (N.J. Super. Ct. App. Div. 1993)
New Mexico	<i>Sarracino v. Martinez</i> , 870 P.2d 155 (N.M. App. 1994)
New York	<i>Shahzaman v. Green Bus Lines Co.</i> , 625 N.Y.S.2d 631 (N.Y. App. Div. 1995)
Ohio	<i>Bruns v. Cooper Indus., Inc.</i> , 605 N.E.2d 395 (Ohio App. 2 Dist. 1992)
Oklahoma	<i>Minor v. Zidell Trust</i> , 618 P.2d 392 (Okla. 1980)
Pennsylvania	<i>Powell v. Drumheller</i> , 653 A.2d 619 (Pa. 1995); <i>Hicks v. Metropolitan Edison Co.</i> , 665 A.2d 529 (Pa. Commw. 1995)
Rhode Island	<i>Walsh v. Israel Couture Post, No. 2274</i> , 542 A.2d 1094 (R.I. 1988)
South Dakota	<i>Holmes v. Wegman Oil Co.</i> , 492 N.W.2d 107 (S.D. 1992)
Texas	<i>Venetoulis v. O'Brien</i> , 909 S.W.2d 236 (Tex. App. - Houston [14th Dist.] 1995, writ requested)

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Tennessee	<i>Haynes v. Hamilton County</i> , 883 S.W.2d 606 (Tenn. 1994)
Washington	<i>Cramer v. Department of Highways</i> , 870 P.2d 999 (Wash. App. Div. 1 1994)
Wyoming	<i>Lynch v. Norton Construction, Inc.</i> , 861 P.2d 1095 (Wyo. 1993)
II. Cases indicating generally that superseding cause and comparative fault co-exist:	
Arizona	<i>Petolicchio v. Santa Cruz County Fair</i> , 866 P.2d 1342 (Ariz. 1994); <i>Smith v. Johnson</i> , 899 P.2d 199 (Ariz. App. Div. 1 1995)
Colorado	<i>Bath Excavating &amp; Const. Co. v. Wills</i> , 847 P.2d 1141 (Colo. 1993); <i>Voight v. Colorado Mountain Club</i> , 819 P.2d 1088 (Colo. App. 1991)
Idaho	<i>Orthman v. Idaho Power Co.</i> , 895 P.2d 561 (Idaho 1995)
Iowa	<i>Hagen v. Texaco Refining &amp; Marketing</i> , 526 N.W.2d 531 (Iowa 1995)
Kentucky	<i>NKC Hospitals, Inc. v. Anthony</i> , 849 S.W.2d 564 (Ky. App. 1993)
Maine	<i>Ames v. Dipietro-Kay Corp.</i> , 617 A.2d 559 (Me. 1992)
Michigan	<i>Hickey v. Zezulka</i> , 487 N.W.2d 106 (Mich. 1992)
Montana	<i>Sizemore v. Montana Power Co.</i> , 803 P.2d 629 (Mont. 1990)
Nebraska	<i>Anderson v. Nebraska Dept. of Soc. Serv.</i> , 538 N.W.2d 732 (Neb. 1995); <i>Merrick v. Thomas</i> , 522 N.W.2d 402 (Neb. 1994)

- New Hampshire *Weldy v. Town of Kingston*, 514 A.2d 1257 (N.H. 1986)
- North Dakota *Champagne v. U.S.*, 513 N.W.2d 75 (N.D. 1994)
- Texas *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994)
- Utah *McCorvey v. Utah State Dept. of Transportation*, 868 P.2d 41 (Utah 1993)
- Vermont *Lavoie v. Pacific Press & Shear Co.*, 975 F.2d 48 (2d Cir. 1992) (applying Vermont law)
- West Virginia *Wehner v. Weinstein*, 444 S.E.2d 27 (W.Va. 1994)
- Wisconsin *Voight v. Riesterer*, 523 N.W.2d 133 (Wis. App. 1994)
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9

Supreme Court, U.S.

FILED

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No. 95-129

**In The  
Supreme Court of the United States**

**October Term, 1995**

**EXXON COMPANY, U.S.A.;  
EXXON SHIPPING COMPANY,**

*Petitioners,*

**v.**

**SOFEC, INC.; PACIFIC RESOURCES, INC.;  
HAWAIIAN INDEPENDENT REFINERY, INC.;  
PRI MARINE, INC.; PRI INTERNATIONAL, INC.,**

*Respondents,*

**v.**

**GRIFFIN WOODHOUSE, LTD.;  
BRIDON FIBRES AND PLASTICS, LTD.,**

*Third-Party Respondents.*

**On Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

**PETITIONERS' REPLY BRIEF ON THE MERITS**

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## PETITIONERS' REPLY BRIEF ON THE MERITS

Petitioners Exxon Company, U.S.A. and Exxon Shipping Company (collectively "Exxon") reply to respondents' briefs on the merits. The HIRI respondents' brief is abbreviated herein as "HRB"; the brief of the third-party respondents and of Sofec is abbreviated herein as "TPB."

INTRODUCTION AND SUMMARY OF  
THE ARGUMENT

Respondents' briefs fail to acknowledge the fundamental issues of admiralty policy presented by this case: Under what circumstances will admiralty defendants be relieved of all liability for marine casualties that are caused in fact by their tortious conduct or by their breach of warranty? Those policy questions are decided by asking what results admiralty law should try to achieve. When the objectives are identified, legal policy is shaped to achieve them, and the resulting law is thereupon applied to the particular case before the Court. The case is the vehicle for the Court's stating admiralty law, but the case is the medium, not the message.

The Court has already identified the objectives that general admiralty law seeks to achieve: promoting maritime safety, deterring wrongdoing most likely to injure others, achieving fundamental fairness, preserving the simplicity that is a characteristic of general admiralty law, and striving for uniformity. *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. \_\_\_, 115 S. Ct. 2091, 2095, 132 L.Ed.2d 148, 154 (1995); *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397, 405 n.11, 409, 95 S. Ct. 1708, 1713 n.11, 1715, 44 L.Ed.2d 251, 259 n.11, 261 (1975); *Italia Societa per Azioni di Navigazione v. Oregon Stevedoring Company, Inc.*, 376 U.S. 315, 324, 84 S. Ct. 748, 754, 11 L.Ed.2d 732, 741 (1964); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631, 79 S. Ct. 406, 410, 3 L.Ed.2d 550, 555 (1959).



The policy questions before the Court are thus: Will owners of dangerous berths and suppliers of extra-hazardous equipment be encouraged to make them safer if they know that they can avoid all liability for marine casualties to which they contributed by blaming the entire loss on navigational ineptitude of masters of endangered vessels? Will masters become better navigators if they know those who furnish unsafe berths and dangerous equipment will escape all liability for their wrongdoing that was a cause-in-fact of the injury if the defendants can convince a trial court that the master's navigation of the vessel was grossly negligent? Is it fair to impose the whole loss of vessels on shipowners if their masters respond very negligently to dangers that they would never have had to face but for defendants' misconduct? The answer to each question is "no."<sup>1</sup>

Allocating marine losses on the basis of the degree of fault of each of the actors in the drama is fair and simple to understand. Common-law legal policies labeled "proximate cause," including superseding cause, are difficult for tort scholars to explain, let alone for shipowners and seafarers to understand and to apply. E.g., W. Keeton, et al., *Prosser and Keeton on the Law of Torts* § 42-45 at pp. 272-321 (5th ed. 1984) (hereafter "*Prosser and Keeton*"). Respondents have given no sound reasons why this Court should import the confusing maze of common-law proximate cause concepts into general admiralty law when comparing degrees of fault that contribute to marine injuries is so much fairer and simpler.

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<sup>1</sup> As the Court knows, ships' captains make their navigational choices with abiding regard for the perils at sea and deep concern for the safety of the ship and the crew, not by pondering what may happen in a courtroom months or even years later. Businessmen running oil refineries and suppliers of marine equipment are far more likely to make choices of conduct based on assessments of the risks of future litigation and liability than are seafarers.

Like common-law plaintiffs, admiralty claimants must carry their burdens of proving that defendants' torts or breaches of contract were causes-in-fact and legal causes of the losses for which they seek recovery. However, the policy reasons for imposing or refusing to impose limitations of liability under legal cause doctrines are not identical in the two situations because the concerns of admiralty courts and the context of the maritime losses are not the same as those ashore.

Respondents' contention that they did not concede that their unspecified wrongdoing was a cause-in-fact of the stranding is not supported by the record. (HRB at p. 16.)<sup>2</sup> Respondents necessarily made that concession because the superseding cause doctrine, which they persuaded the district court to accept to grant their bifurcation motion, is not even relevant unless it is first established that the defendant's misconduct was a substantial factor in producing the injury; otherwise a defendant has no liability for the superseding cause doctrine to limit. (*Prosser and Keeton, op. cit. supra*, § 42 at pp. 272-73.) *Prosser and Keeton* explains that the effect of intervening forces presents "a question of the extent of the defendant's original obligation; and once more the problem is not primarily one of causation at all, since it does not arise until cause in fact is established. It is rather one of the policy as to imposing legal responsibility." (*Prosser and Keeton, op. cit. supra*, § 44 at p. 301.)

Dissatisfied with the questions presented upon which the Court granted *certiorari*, respondents have chosen to present and argue different questions. (HRB at p. i; TPB

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<sup>2</sup> In arguing respondents' bifurcation motion, counsel for Bridon Fibres said: "Now the Court is absolutely right that but for the breakout there wouldn't have been the grounding in this case, but for - but that's not enough for proximate causation." 7/27/92 RT 31.

at p. i.) They vigorously attack points that Exxon has not raised and misstate the contentions that Exxon has made.

Contrary to respondents' briefs, Exxon has not recited any version of the events that is contradicted by the district court's findings.<sup>3</sup> (HRB at 13.) The facts stated by Exxon are fully supported by the record and by the district court's findings of fact. Respondents' quarrel with Exxon's recitation of the facts boils down to umbrage that Exxon's brief called the responses of Captain Coyne and the crew of the tanker "heroic". The description is apt, even accepting the district court's conclusion that the Captain was grossly negligent. How many heroes are careful?

Exxon *has* attacked the district court's erroneous conclusions of law, which respondents often cite as if they were findings of fact. (E.g., HRB at 13-14.) Respondents contend that Exxon's statement that the captain and the crew of the tanker were "valiantly dealing with a whole succession of emergencies" contradicts the district court's factual findings. (HRB at 15.) In support of that argument, respondents quote conclusions of law and a statement from the Ninth Circuit's opinion that is contradicted by the record. (HRB at 15-16.) Respondents' vituperative attack on Exxon's statement that the captain had no reason to "anticipate that the tanker would be anywhere near the stranding area until the whole chain of events occurred after the chain parted" is likewise supported by the record. The captain knew where the vessel was; he had no reason to predict that it would be far from the supposedly safe berth until the series of emergencies occurred after the SPM failed.

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<sup>3</sup> Exxon did not attack the findings in the court of appeals because they were made on sharply conflicting evidence; an appellate attack would have been futile. Such an attack would be irrelevant here because this Court does not sit as an error correcting court.

The basic premise of respondents' arguments is that the district court factually found that the tanker had escaped the perils created by their conduct not later than 1830 and even as early as 1803. (E.g., HRB at pp. 14-15; TPB at p. 35.) Respondents rely on the district court's legal conclusions, and the court's legal conclusions are inconsistent with its factual findings. Thus, the court found that while the cargo hose was suspended from the crane, it caused the crane to collapse at 1944 injuring the crane operator. (Findings 64, 66, JA 156.) It also found that Captain Coyne commenced the final turn at 1956. (Findings 74, JA at p. 157.) HIRI's mooring master and crewmen of the tanker would never have had to spend over an hour to unbolt the dangerous cargo hose from the ship's manifold (Findings 64, JA 156), nor would the NENE have had to keep trying to prevent the hose from moving under the tanker throughout the ordeal, nor would the crane have collapsed if the chafe chain had not parted, the hoses had not broken, the hoses had been equipped with safety devices and adequate tug assistance had existed. The evidence was uncontradicted that when the crane collapsed, the boom began sweeping the tanker's deck creating imminent danger of serious injuries to the deck crew and destruction of the vessel by explosion. (2/18/93 RT 25-26.) The absence of any findings of fact by the district court on that point does not change the record: The trailing cargo hose presented a continuing danger to the tanker from the time it broke to the crane's collapse through the efforts to secure the boom - *i.e.*, less than 12 minutes before the tanker commenced its turn at 1956.<sup>4</sup>

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<sup>4</sup> The statement in the Ninth Circuit's opinion upon which respondents rely to claim that the tanker was out of danger by 1803 (HRB at 15) is contradicted by the record, as well as by the district court's finding that the hose caused the crane to topple at 1844.



Even if the doctrine of superseding cause had been incorporated into general admiralty law, it would not have relieved respondents of liability because the risk of stranding the EXXON HOUSTON (and every other tanker that moored at the SPM) was a foreseeable hazard created by respondents' torts and breaches of admiralty warranties. (E.g., *Prosser and Keeton*, *op. cit. supra*, at pp. 303-306.) When the harm that happened is within the risks that a defendant foresaw or that his duties to the plaintiff required him to foresee, the fact that the harm came about in an unforeseen way does not limit or defeat liability. E.g., *Restatement (Second) of Torts*, (hereafter "*Restatement*") §§ 281, 433, 435, 441, 442B, 450, 451 (1965). "[T]he effect of intervening forces . . . [presents] a 'hazard problem' rather than a problem of causation," (*Id.* at § 281, cmt. h); *Prosser and Keeton*, §§ 43, 44 at pp. 289-299, 316.

To prove that a particular casualty was or should have been foreseen by a defendant and was within the risks created by defendant's wrongs, a plaintiff must be permitted to present proof of the duties that the defendant involuntarily or voluntarily assumed, the risks created by the breaches of those duties, and the culpability of those breaches. E.g., *Prosser and Keeton*, *op. cit. supra*, § 43 at pp. 280-84. By preventing Exxon from proving its case-in-chief, the court foreclosed the evidence that would have destroyed respondents' foreseeability and superseding cause arguments. Respondents' briefs misconceive Exxon's arguments, and therefore miss the points. (HRB at 44-45, 47-50; TPR at 46-49.)

Contrary to respondents, Exxon's due process argument is not based solely on the district court's bifurcation order. (HRB at pp. 43-45.) The district court did abuse its discretion in granting respondents' bifurcation motion because legal cause cannot be correctly tried by excluding evidence to prove the extent of defendants' duties to plaintiffs and the risks created by breaches of those duties. The bifurcation motion, *plus* the court's later rulings foreclosing Exxon from presenting its evidence on

those very points, *plus* the entry of judgment against Exxon on Phase I created the constitutional issue. The district court not only tried the case backwards and upside-down, it prevented Exxon from trying its liability case at all. The issues of liability on which the Court granted *certiorari* were intertwined with the due process issue; accordingly the due process point was within the questions presented.

Stranding the tanker was a foreseeable consequence of respondents' breaches of their express and implied admiralty warranties. The failure of the tanker's captain to prevent the casualty is an issue that affects damages, not liability, and the damage issues were never tried.

## ARGUMENT

### I. EXONERATING RESPONDENTS FROM ALL LIABILITY IN TORT FOR THE LOSS OF THE TANKER IS INCONSISTENT WITH THE COURT'S ADMIRALTY POLICIES THAT IMPELLED IT TO ADOPT COMPARATIVE FAULT

The Court's general admiralty policies in tort cases are explicit in *Kermarec*, 358 U.S. at 631, and *Reliable Transfer*, 421 U.S. at 405, n. 11: (1) common-law tort doctrines are not imported when they are not simple and practical in the marine context; and (2) the legal principles that are adopted in admiralty, whether in negligence, strict product liability in tort, or breach of admiralty warranties, must be fair and have the effect of imposing liability on the parties best able to protect persons and property from failures of hazardous equipment and to deter wrongful behavior that is most likely to harm others. *Accord: East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865-866, 106 S. Ct. 2295, 2299,



90 L.Ed.2d 865, 873-74 (1986); *Italia Societa per Azioni di Navigazione*, 376 U.S. at 323-324 (1964).<sup>5</sup>

Respondents are simply mistaken when they argue that "[n]either this Court nor any other sits to enforce illusory standards like 'deterrent effect' or 'best situated.'" (HRB at p. 30.) They confuse public policy doctrines with the law that emerges to enforce them. Respondents propose that the common-law doctrines of legal cause, including superseding cause, should be imported wholesale into admiralty because those doctrines (as respondents have chosen to interpret them) would reduce admiralty defendants' liability, shorten discovery, pre-trial and trial time, and harmonize American general admiralty law with the Brussels Convention<sup>6</sup> and British law. Respondents' proposal cannot be reconciled with existing admiralty policy; since *Reliable Transfer*, general admiralty law pronounced by this Court is in harmony with the Brussels Convention

<sup>5</sup> Referring to strict liability for unseaworthiness and strict liability for breach of implied warranty of workmanlike service, the Court explained in *East River Steamship Corp.*: "The Court's rationale in those cases - that strict liability should be imposed on the party best able to protect persons from hazardous equipment - is equally applicable when the claims are based on products liability. [Citations omitted.] And to the extent that products actions are based on negligence, they are grounded in principles already incorporated into the general maritime law. [Citing *Kermarec*]." 476 U.S. 858, 866.

The Court held that strict product liability in tort would not lie in admiralty when a defective product manufactured by the defendant malfunctioned and injured only the product itself. Thus, the holding of the case is not relevant here, but the admiralty policies expressed are applicable in our case.

<sup>6</sup> The International Convention for the Unification of Certain Rules of Law with Respect to Collisions between Vessels, signed at Brussels on September 23, 1910. The Convention was reprinted in 8 N. Singh *International Conventions of Merchant Shipping* 1337 (2d ed. 1973).

and with British admiralty law, except that, in Article 6, the Brussels Convention abolished all legal presumptions of fault in regard to liability for collision.

The objectives of general admiralty law are not to relieve wrongdoers from their aliquot shares of the losses from marine casualties caused in fact by their misconduct, nor to discourage meritorious litigation, nor to avoid the necessity of proving elements of liability or damages that may be time consuming. Rather, admiralty policies are intended to reach results that are equitable and, at the same time, that will deter wrongful conduct and will increase the safety of persons and property in the maritime industry. See, e.g., *Reliable Transfer*, 421 U.S. at 407; *East River Steamship Corp.*, 476 U.S. at 866.

Wholesale adoption of common-law proximate cause legal principles into the law of admiralty has nothing to recommend it as the Court explained in *Kermarec*. Proximate cause concepts developed by common law are anything but simple and uniform. As *Prosser & Keeton* aptly observe:

This connection [between a defendant's act and plaintiff's injury] usually is dealt with by the courts in terms of what is called "proximate cause," or "legal cause." There is perhaps nothing in the entire field of law which has called forth more disagreement, or upon which the opinions are in such a welter of confusion. *Id.* § 41 at p. 263.

Actual causation is always a question of fact. Legal cause, however, is an expression of social policy whereby defendants' liability is sometimes limited because the circumstances that combine to produce plaintiffs' injury are remote from the risks entailed by defendants' misconduct.

Since the adoption of the British Maritime Conventions Act of 1911 (1 & 2 Geo. V, C. 57), British admiralty law substantially adopted the Brussels Convention.

Under British law, as here, comparative fault is not applied when only one of the actors in a marine casualty committed a wrong that was causally related to the loss; but when more than one actor's misconduct contributes to the loss, the parties must bear the loss in proportion to the degree of the fault of each. Under British law, as here, both the culpability of the misconduct of each of the actors and the extent to which the fault of each contributed to the loss (irrespective of its blameworthiness) must be taken into account. *The Statue of Liberty*, 2 Lloyd's List L.R. 277, 282 (1971); *The Miraflores & The Abadesa*, 1 A.C. 826, 845 (1967) (in determining the degrees of fault to be compared, "[t]he investigation is concerned with 'fault' which includes blameworthiness as well as causation. And no true apportionment can be reached unless both factors are borne in mind").

Respondents misunderstand the role of this Court when they argue that "[n]either this Court nor any other sits to enforce illusory standards like 'deterrent effect' or 'best situated' " (HRB at p. 30). The Court *does* establish admiralty policy, and it formulates general admiralty law to achieve the public policy goals that it has identified. Respondents have simply chosen to disregard the admiralty policies that the Court has adopted and have urged the Court to adopt different policies more to their liking in this case.

Contrary to respondents' arguments, this case cannot be effectively distinguished from *Reliable Transfer* and *City of Milwaukee*, even assuming that Captain Coyne was grossly negligent. The captains of the plaintiffs' vessels in both of those cases were grossly negligent.

In *Reliable Transfer*, the shipowner sought damages from the government for the stranding of its tanker because the Coast Guard had negligently maintained a breakwater light. The tanker captain knew that the light was not working on the night that the tanker grounded on a sand bar outside New York harbor. Although the

tanker was equipped with radar, navigation charts and other instruments, the captain used none of them in navigating the tanker. Mistakenly believing that he was heading out to sea, the captain ordered the tanker to make a 180-degree turn when the tide was at flood and a severe storm was causing rough seas. The district court concluded that the tanker would not have stranded but for the non-functioning of the breakwater light, and it found that the tanker captain was 75 percent at fault for the stranding and the Coast Guard's negligence was 25 percent of the fault.

On appeal, the government argued that the Coast Guard's negligence was not a cause of the stranding. The Second Circuit disagreed because "[s]urely it was a but-for cause." *Reliable Transfer Co., Inc. v. United States*, 497 F.2d 1036, 1038 (2d Cir. 1974). The Second Circuit described the government's causation argument as "essentially a variation of the last clear chance doctrine" and rejected it. *Ibid.* The court recognized that it was manifestly unfair to have to divide damages fifty-fifty when the tanker owner was seventy-five percent at fault for the stranding, but until this Court overturned the divided damages rule, the Second Circuit was bound by it.

This Court accepted the Second Circuit's implied invitation to correct the unfairness of the divided damages rule in *Reliable Transfer*. The case was an appropriate vehicle for adopting comparative fault because more than one actor's wrongdoing contributed to the casualty (as is true in our case).<sup>7</sup>

Respondents' reliance on *Union Oil Co. of Cal. v. The San Jacinto*, 409 U.S. 140, 93 S. Ct. 368, 34 L.Ed.2d 365

<sup>7</sup> *City of Milwaukee*, 515 U.S. \_\_\_, 132 L.Ed.2d 148, followed *Reliable Transfer* in apportioning fault between the less negligent City and a grossly negligent shipowner.



(1972) is seriously misplaced. (TPB at pp. 23-24.) Although more than one party was involved in that collision between a barge and a tanker on the Columbia River, only one of the parties was at fault, and, therefore, *The San Jacinto* could not be a vehicle for replacing divided damages with comparative fault. The barge was being hauled by a tug down the Columbia River when the tanker was proceeding upstream. After the tug entered fog on its side of the river, the tug captain mistakenly thought he saw range lights indicating an imminent collision. He caused the tug to make a U-turn putting the vessels on a collision course. Although the tanker captain ordered her full astern when the tug was sighted at a distance of 900 feet, the tanker could not move backward fast enough to escape the towed barge which thereupon crashed into the port bow of the tanker driving her aground. The district court held that the tug was solely at fault. The Ninth Circuit reversed, in part, holding that the tanker captain was also negligent because he had violated a regulatory maritime duty and was therefore presumptively negligent under *The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1874). This Court reversed because the regulatory rule upon which the Ninth Circuit relied was not applicable under the circumstances of the case. Because only one party was negligent, all the loss had to be borne by the tug. The Court explained:

"The District Court's finding that any negligence on the part of the Santa Maria [the tanker] did not "proximately [contribute] to the collision" was but another way of saying that fault based on the half-distance rule must have some relationship to the dangers against which that rule was designed to protect. Here it did not." [First bracketed language added; second bracketed word in original.]

409 U.S. at 146.

In our case, the district court foreclosed Exxon from offering its evidence which would have proved that Captain Coyne's negligence under the circumstances was slight as compared with the egregious breaches of duty that the respondents voluntarily assumed or were required to assume as a matter of law.<sup>8</sup>

## II. IF THE COURT HAD INCORPORATED COMMON-LAW SUPERSEDING CAUSE INTO GENERAL ADMIRALTY LAW, RESPONDENTS WOULD NOT THEREBY ESCAPE LIABILITY

The district court recognized that one of the hazards created by the breakout was grounding (Conclusions 45a, JA 175) and that "the breakout was a cause-in-fact of the stranding." (Conclusions 7, JA 162.) The court went legally astray because it decided that respondents' torts, no matter how culpable, could not be a legal cause of the stranding unless " 'the forces set in motion by the breakout of the EXXON HOUSTON continued until the moment of grounding. *Hahn v. United States*, 535 F. Supp. 132 (D.S.D. 1982). ' " (Conclusion 8, JA 162.)<sup>9</sup> The court misconceived and misapplied common-law legal cause. Section 442B of the *Restatement* states the applicable principles:

Where the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the

<sup>8</sup> The Court's foreclosure of Exxon's evidence is the basis of the due process issue discussed *infra* at pp. 15-16.

<sup>9</sup> *Hahn* is not in point. It was a wrongful death action brought by a private aircraft pilot under the Federal Tort Claims Act on the theory that the government's failure to install warning lights on its power line caused the aircraft to strike the line. The district court held that the government had no liability because the absence of warning lights was not a cause-in-fact of the casualty.



fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct.

Because misconduct of the respondents *did* create the risk of stranding and *was* a substantial factor in causing that harm, Captain Coyne's gross negligence did not become a superseding cause of the stranding.<sup>10</sup>

The district court's holding that Captain Coyne was solely at fault for the stranding because the danger of stranding created by respondents' torts had ended at 1830 (Conclusion 46, JA 175-75) is in conflict with its findings that the cargo hose caused the crane to collapse injuring the crane operator at 1944 – just 12 minutes before the tanker commenced the final turn. (Findings 64, 74, JA 156-57.) Respondents created the legal cause chain before the HOUSTON left the mainland because the berth was not safe, the SPM and its equipment and the cargo hoses were dangerously defective, and respondents had taken none of the safety measures that were required to make the berth and the equipment safe. The cargo hoses would not have broken if the chafe chain had not parted. The cargo hose would not have trailed and imperiled the tanker if the safety devices on the hoses had not been removed. The parting of the chafe chain and the cargo hoses would not have seriously endangered the tanker and her crew if respondents had taken any of the safety measures that had earlier been recommended or that the Coast Guard required the HIRI respondents to undertake

<sup>10</sup> The Second Circuit correctly stated the common-law principles in Judge Friendly's lucid opinion in *Petition of Kinsman Transit Co.*, 338 F.2d 708 (2d Cir. 1964), *cert. denied sub nom.*, *Continental Grain Co. v. City of Buffalo*, 380 U.S. 944, 85 S. Ct. 1026, 13 L.Ed.2d 963 (1965).

after the HOUSTON's stranding. HIRI's mooring master and the tanker's crew would not have had to take over an hour to remove the bolts affixing the trailing cargo hose to the tanker's manifold if the prior misconduct had not happened. The hose would not have caused the crane to collapse injuring one of the crewmen and threatening the lives of the deck crew and the tanker itself if the chafe chain had not parted. To relieve respondents of all liability for the casualty under these circumstances does not make common sense, let alone admiralty sense.

### III. THE DUE PROCESS ISSUE IS FAIRLY ENCOMPASSED BY THE QUESTIONS PRESENTED

Contrary to respondents' arguments (HRB at pp. 43-45), Exxon's constitutional attack is not founded solely on the bifurcation order. Constitutional deprivation was begun by that order, but it was completed by the district court's subsequent exclusionary orders and ultimate judgment that foreclosed Exxon from ever proving its liability case-in-chief.

The respondents persuaded the district court that it could properly split the issue of legal cause by first trying the Captain for everything that happened *after* the break-out in Phase I. Only after Phase I was tried and decided would Exxon be permitted (if ever) to introduce any of its abundant evidence about the events and conduct of the respondents that occurred *before* the break-out. Over Exxon's vehement objection, the court granted respondents' bifurcation motion, and, pursuant thereto, it foreclosed Exxon from introducing any of its evidence to prove the scope of the duties that each of the respondents owed Exxon in their various roles as warrantors of safe berth (the HIRI respondents), as wharfingers (the HIRI respondents), as designers, vendors, or furnishers of extra-hazardous marine equipment and as implied warrantors of the quality of marine services supplied to

Exxon (all respondents). The court also foreclosed all of Exxon's evidence about the breaches of those duties and the culpability of the respective respondents' conduct. Legal cause could not be correctly decided without the evidence that the district court foreclosed. Phase II was never tried because the court entered judgment against Exxon at the conclusion of Phase I.

The question whether a defendant should be relieved of liability, in whole or in part, for a casualty to which his own conduct contributed cannot be decided by permitting only one piece of the legal cause puzzle to be tried. To do so violates the due process principles stated in *Gasoline Products Co., Inc. v. Champlin Refining Co.*, 283 U.S. 494, 51 S. Ct. 513, 75 L.Ed. 1188 (1931). Those principles are not confined to jury trials. (HRB at p. 48.) The same fair trial principles apply in non-jury cases. *See, e.g.*, 6A J. W. Moore et al., *Moore's Federal Practice* ¶ 59.06 (2d ed. 1995) (applying the same concepts to determine whether a new trial may be ordered in jury and non-jury cases with respect to less than all of the issues in a case).

Respondents argue that cutting legal cause in two and foreclosing all evidence on the severed part did not deny Exxon a fair trial because an "extraordinary lapse of time" distanced respondents' wrongdoings from the stranding. (HRB at p. 49.) As the district court's own findings established, however, the time that elapsed from the moment the crane collapsed to the tanker's commencing its final turn was twelve minutes. In the meantime HIRI's mooring master and crewmen of the tanker were trying to unbolt the cargo hose; Captain Coyne and his deck crew, together with the crew of the NENE, were constantly struggling with the dangers to both vessels posed by the trailing cargo hose, the storm and the darkness. To argue that all of those difficulties were severable from respondents' serious breaches of duty to Exxon is to ignore reality as well as basic principles of legal cause.

#### IV. RESPONDENTS CANNOT ESCAPE LIABILITY FOR BREACHES OF WARRANTY BECAUSE THE CAPTAIN WAS GROSSLY NEGLIGENT

Respondents' arguments on Exxon's claims for breach of express and implied admiralty warranties thoroughly confuse issues relating to liability with those relating to damages, and they misread the authorities upon which they rely. (HRB at pp. 32-38; TPB at pp. 40-45). To establish liability for breach of contract, it is, of course, necessary that the plaintiff prove that there is a causal connection between the breach and an injury from the breach. Both the fact of injury and the fact that the injury would not have happened but for respondents' wrongdoing was established here, as the district court found. No more is required to prove liability for respondents' breaches of warranty. Respondents' arguments are relevant only with respect to damages for breach of contract, as the very authorities cited by respondents make clear.

Unless changed by statute, the rule of *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 45 (1854) is still the accepted doctrine for limiting damages recoverable for breach of contract: General damages are usually confined to those which would naturally arise from the breach or which might have reasonably been contemplated or foreseen as the probable result of the breach by both parties at the time they made their contract. If special circumstances caused some unusual injury, damages for that injury are not recoverable unless the circumstances were known or should have been known to the guilty party at the time he entered the contract. *E.g.*, 5 A. Corbin, *Corbin on Contracts*, §§ 1006 *et seq.* (1964).

The doctrine of avoidable consequences is applied only to ascertain the amount of recoverable damages; it is irrelevant to the issue of liability. That is the very point made by authority respondents have cited. (HRB at p. 34.)



E.g., *Pennzoil Producing Co. v. Off-Shore Express, Inc.*, 943 F.2d 1465, 1474 (5th Cir. 1991) (the doctrine of avoidable consequences is a rule of damages; "as such it stands wholly apart from the rules that determine who is at fault for the initial injury"); *Delta Transload, Inc. v. M/V Navios Commander*, 818 F.2d 445, 452 (5th Cir. 1987) (defendant could not argue the doctrine of avoidable consequences in the liability phase of the action to recover for loss of a marine buoy damaged by defendant's vessel because the doctrine "is not considered a defense at all, but merely a rule of damages by which certain particular items of loss may be excluded from consideration". [Citation omitted.]); *Federal Ins. Co. v. Sabine Towing & Transp. Co.*, 783 F.2d 347, 350 (2d Cir. 1986) (the doctrine of avoidable consequences is not a defense; it applies only to a diminution of potential damages, not to the existence of a cause of action); *Tennessee Valley Sand & Gravel Co. v. M/V Delta*, 598 F.2d 930, 932-33, modified and rehearing denied, 604 F.2d 13 (5th Cir. 1979) (the doctrine is merely a method of apportioning damages when, after harm has been inflicted, the injured party has failed to exercise reasonable care in mitigating his loss).<sup>11</sup>

Respondents cannot successfully argue that the risk of stranding was not foreseeable at the time respondents gave Exxon their express and implied warranties. (TPB at p. 41.) No powers of Cassandra were required for respondents to foresee that the stranding of tankers was likely when the SPM and its allied equipment failed, particularly under the severe weather conditions that existed

<sup>11</sup> *Pennzoil Producing Co.* correctly explains the avoidable consequences doctrine: "In order to successfully invoke the doctrine of avoidable consequences to limit a plaintiff's recovery, the defendant must show both 1) that the plaintiff has acted unreasonably after the injury has occurred, and 2) that the plaintiff's unreasonable actions aggravated his damage." 943 F.2d at 1475.

when Exxon's tanker was moored at the defective SPM. The district court acknowledged that reality.

Contrary to respondents argument (HRB at p. 32), the admiralty principles stated in *Italia Societa* and *East River Steamship Corp.* are equally applicable here. To be sure, the defendant in *Italia Societa* was a stevedore that furnished dangerous equipment that injured a longshoreman, and, in our case, the respondents who furnished the dangerous equipment acted in different capacities, but those distinctions make no legal difference in this case.

Exxon is entitled to recover its monetary loss caused-in-fact by respondents' breaches of warranties, just as that shipowner in *Italia Societa* was entitled, by implied indemnity, to recover its monetary loss occasioned by its having to pay for the longshoreman's injury that was caused by the defendant's breach of warranty. Ours is a stronger case than *Italia Societa* because in that case the stevedore was not negligent in supplying the defective equipment. Here, as in *Italia Societa* and *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.*, 355 U.S. 563, 78 S. Ct. 438, 2 L.Ed.2d 491 (1958), the negligence of a shipowner or the unseaworthiness of its vessel is not fatal to its recovering damages from the furnisher of unsafe equipment for breach of contract. The admiralty policies that underlie the court's imposition of liability in *Italia Societa* are also applicable here:

[L]iability should fall upon the party best situated to adopt preventive measures and thereby to reduce the likelihood of injury. Where, as here, injury-producing and defective equipment is under the supervision and control of the stevedore, the shipowner is powerless to minimize the risk; the stevedore is not.

376 U.S. at 324. Respondents, not Exxon, had the power to control the equipment that failed, and HIRI, not Exxon, had the power to make the berth safe, as HIRI had expressly warranted.



**CONCLUSION**

Exxon respectfully requests that the judgment be reversed with directions to the Ninth Circuit to remand the case to the district court for a new trial.

Dated: February 27, 1996.

Respectfully submitted,

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Supreme Court, U.S.

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No. 95-129

**In The  
Supreme Court of the United States  
October Term, 1995**

**EXXON COMPANY, U.S.A., et al.,**  
*Petitioners,*  
**vs.**

**SOFEC, INC., et al.,**  
*Respondents.*

**On Writ Of Certiorari To The  
United States Court Of Appeals  
For The Ninth Circuit**

**MOTION BY THE MARITIME LAW ASSOCIATION  
OF THE UNITED STATES FOR LEAVE TO FILE  
BRIEF OF AMICUS CURIAE AND BRIEF OF  
AMICUS CURIAE IN SUPPORT OF PETITIONERS**

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Brief as Amicus Curiae*

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**MOTION BY THE MARITIME LAW ASSOCIATION  
OF THE UNITED STATES TO FILE  
AMICUS CURIAE BRIEF**

Applicant, The Maritime Law Association of the United States ("MLA"), moves the Court for leave to file an *amicus curiae* brief in support of Petitioners, Exxon Company, U.S.A., *et al.* Petitioners have given consent to the MLA to file an *amicus* brief, but Respondents have refused to consent. Accordingly, Applicant seeks leave to file pursuant to Supreme Court Rule 37.4.

**NATURE OF APPLICANT'S INTEREST**

The MLA is a nationwide bar association founded in 1899, with a membership of about 3600 attorneys, law professors and others interested in maritime law. It is affiliated with the American Bar Association and is represented in that Association's House of Delegates. Its attorney members, most of whom emphasize their practice in admiralty law, represent all maritime interests - ship-owners, charterers, cargo interests, port authorities, seamen, longshoremen, passengers, underwriters and other maritime claimants and defendants.

The purposes of the MLA, as stated in its Articles of Association, are to:

. . . advance reforms in the Maritime Law of the United States, to facilitate justice in its administration, to promote uniformity in its enactment and interpretation . . . and to act with other associations in efforts to bring about a greater harmony in the shipping laws, regulations and practices in different nations.

In furtherance of these objectives, the MLA has sponsored a wide range of legislation dealing with maritime



matters during its ninety-seven years of existence, including the Carriage of Goods by Sea Act<sup>1</sup> and the Federal Arbitration Act.<sup>2</sup> The MLA has also cooperated with congressional committees in the formulation of other maritime legislation.<sup>3</sup>

The MLA also participates in several projects of a maritime legal nature undertaken by agencies of the United Nations, including its commissions on trade law ("UNCITRAL") and trade and development ("UNCTAD") and works closely with the International Maritime Organization ("IMO"). The MLA also actively participates as one of some forty-nine national maritime law associations constituting the Comité Maritime International in the movement to achieve maximum international uniformity in maritime law through the medium of international conventions.<sup>4</sup>

<sup>1</sup> 46 U.S.C. §§ 1300-1315.

<sup>2</sup> 9 U.S.C. §§ 1-5.

<sup>3</sup> E.g., 1972 Water Pollution Control Act Amendments, 33 U.S.C. §§ 1251-1376; implementation of the 1972 Convention For Preventing Collisions at Sea, 28 U.S.T. 3459, T.I.A.S. 8587, U.N.T.S. 15824, as amended, T.I.A.S. 10672, reprinted in 6 BENEDICT ON ADMIRALTY, Doc. No. 3-4 at 3.35 to 3-78.2 (7th rev'd ed. 1995) (hereinafter "BENEDICT"), see 33 C.F.R. ch. 1, subch. D., Special Note at 160 (1987); United States Inland Navigation Rules, 33 U.S.C. §§ 2001-2073.

<sup>4</sup> E.g., Assistance and Salvage (1910), 37 Stat. 1658 (1913), reprinted in 6 BENEDICT, Doc. No. 4-1 at 4-2 to 4-10; Ocean Bills of Lading (The Hague Rules) (1924), 120 L.N.T.S. 155, reprinted in 6 BENEDICT, Doc. No. 1-1 at 1-2 to 1-19; Collision (1910), reprinted in 6 BENEDICT, Doc. No. 3-2 at 3-11 to 3-19; Limitation of Liability of Owners of Sea-Going Ships (1957), reprinted in 6 BENEDICT, Doc. No. 5-2 at 5-11 to 5-29; Maritime Liens and Mortgages (1967), reprinted in 6A BENEDICT, Doc. No. 8-3 at 8-25 to 8-32; Civil Liability for Oil Pollution Damages (1969),

The MLA has filed *amicus* briefs as in a number of cases, including briefs accepted by this Court.<sup>5</sup> For example, in *Offshore Logistics, Inc. v. Tallentire*,<sup>6</sup> this Court agreed with the position advocated by the MLA and noted the MLA's role in relation to the matters at issue. The Court stated that:<sup>7</sup>

The Maritime Law Association ("MLA"), an organization of experts in admiralty law and a prime force in the movement for a federal wrongful death remedy, drafted the bill that was enacted as DOHSA (the Death on the High Seas Act). . . . [T]he MLA, an expert body of maritime lawyers, had reason to fear that absent a savings clause [such as Section 7 of DOHSA], specifically recognizing the continued viability of this type of action, state wrongful death remedies on territorial waters might be deemed beyond the competency of state courts.

It is the policy of the MLA to participate as *amicus curiae* only when important issues of maritime law or practice are involved, and only when the impact of the Court's decision may be substantial. The Bylaws of the

U.N.T.S. 1409, reprinted in 6 BENEDICT, Doc. No. 6-3 at 6-62.103 to 6-76.3; and Limitation of Liability for Maritime Claims (1976), reprinted in 6 BENEDICT, Doc. No. 5-4 at 5-32.1 to 5-44.3.

<sup>5</sup> *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140 (1988); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325 (1973); *American Dredging Co. Inc. v. Miller*, \_\_\_ U.S. \_\_\_, 14 S. Ct. 981 (1994); *McDermott, Inc. v. AmClyde*, \_\_\_ U.S. \_\_\_, 114 S. Ct. 1461 (1994). For a more comprehensive listing, see MLA Report, MLA Doc. No. 671 at 8862-63 (1987).

<sup>6</sup> *Id.*

<sup>7</sup> 477 U.S. at 223-24.

MLA require that its participation as *amicus curiae* must be approved by the President, in consultation with the First and Second Vice-Presidents, and then submitted to the Executive Committee. The Bylaws provide that such approval must be given sparingly, and only when one or more of the following criteria are met:<sup>8</sup>

- (a) The outcome of the litigation would adversely affect the uniformity of maritime law.
- (b) The outcome of the litigation would adversely affect traditional admiralty practice or procedure.
- (c) The outcome of the litigation would adversely affect traditional admiralty jurisdiction.
- (d) The outcome of the litigation would affect the meaning of a law or treaty advanced by the Association.

#### REASONS FOR REQUESTING LEAVE TO FILE THIS BRIEF AS *AMICUS CURIAE*

The MLA is seeking to file an *Amicus* brief because the decision of the courts below seriously undermines the uniform principles of the comparative fault doctrine articulated by this Court in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975). The decision further adversely affects traditional admiralty practice and procedure.

The parties to this litigation have presented or will present to this Court their views regarding this doctrine under the facts of this case and insofar as it affects the

<sup>8</sup> Bylaws of the Maritime Law Association of the United States, Section 500-13.

outcome of this litigation. Their law focus is reasonably and naturally concerned with that ultimate outcome. However, as reflected in the brief herein, the ultimate decision will affect the rules applicable to all maritime casualty and the potential interplay of the common law defense of cause.

The MLA's perspective, arising from its interest in the fair and effective administration of maritime law in the United States, is necessarily different from that of the parties to this suit. The MLA can comment objectively about the impact of this decision on the uniformity of maritime law regarding the issues presented. The MLA brief concentrates upon the underlying principles and how the common law defense might be employed without disruption to those principles, a consideration of no particular interest to the parties herein.

The MLA therefore respectfully moves for leave to file its brief herein.

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The Maritime Law Association of the United States ("MLA") respectfully submits this brief as *amicus curiae* in support of the Petitioners, Exxon Company, U.S.A., et al.

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INTEREST OF AMICUS CURIAE

As recited in detail in the Nature of Applicant's Interest in the accompanying Motion, *supra*, MLA has a very strong interest in the disposition of this case. MLA is a nationwide bar association founded in 1899 and incorporated in 1993 with about 3,600 attorneys, law professors and others interested in maritime law.

The MLA's formal objectives include the advancement of reforms of maritime law, the promotion of uniformity and the facilitation of justice in the administration of maritime law. The MLA's attorney members represent all maritime interests – shipowners, charterers, cargo owners, shippers, forwarders, port and terminal authorities, stevedoring companies, seamen, longshoremen, passengers, marine insurance underwriters and brokers and other maritime plaintiffs and defendants.

The MLA has, in furtherance of the uniformity policy and resolutions, filed *amicus* briefs in a number of cases, including a number of briefs accepted by this Court.<sup>1</sup> It is the policy of the MLA to file briefs as *amicus curiae* only when important issues of maritime law are involved or the Court's decision may substantially affect the uniformity of maritime law. Such a situation exists in this case.

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<sup>1</sup> See Note in Motion for Leave, *supra*.

This case concerns the interplay of the comparative fault rule with the common law defense of superseding cause. The comparative fault rule was adopted by the Court in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), and is applicable to all marine collisions and strandings. It mandates the allocation of liability for marine casualties among the parties whose actions proximately caused the casualty in proportion to their fault. As applied by the courts below, the superseding cause defense could permit the exoneration of defendants from liability without any comparative analysis of their conduct and contributing fault. As applied, such a rule directly contravenes the comparative fault rule and undermines the equitable goals of the maritime law.

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### SUMMARY OF THE ARGUMENT

In 1975 this Court adopted the rule of comparative fault in admiralty in *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975). Therein, the Court held

when two or more parties have contributed by their fault to cause property damage in a marine collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault . . .

*Reliable Transfer*, 421 U.S. at 411.

The comparative fault doctrine was adopted explicitly to achieve a fair and equitable allocation of damages resulting from marine casualties. The vitality and fairness of this doctrine have recently been reaffirmed by the

Court in two separate settings. *McDermott, Inc. v. AmClyde*, 511 U.S. \_\_\_, 114 S. Ct. 148 (1994) and *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, \_\_ U.S. \_\_\_, 115 S. Ct. 2091 (1995). Likewise lower courts have employed the doctrine's equitable standard to avoid harsh "all-or-nothing" results.

The question presented concerns the interplay of the common law defense of superseding cause with the comparative fault doctrine in admiralty. This common law defense is based upon a policy determination of when a party will be exonerated from responsibility for the consequences of its negligence because of the operation of subsequent or intervening causes. W. Page Keaton, *et al.*, *Prosser and Keaton on Torts* § 44, pp. 301-19 (5th ed. 1984) and *Restatement (Second) of Torts* (1965), § 440-444. This defense is not rooted in causation, but is derived from consideration of multiple factors bearing upon the conduct and fault of all parties and the anticipated or "foreseeable" consequences of the original negligence. Determination of these factors necessarily involves consideration of the conduct and fault of all parties involved in a casualty.

The trial and appellate courts below have applied this defense in a fashion which directly conflicts with the comparative fault rule. Under the auspices of this defense, the trial court considered the degree of culpability of only the plaintiffs and failed to examine the conduct of defendants and evaluate the nature and degree of their potential contributive fault. When applied in this fashion, the common law defense violates the tenets of *Reliable Transfer* and directly contravenes the



goal of achieving a fair and equitable allocation of damages.

---

### ARGUMENT

The brief of *Amicus* MLA addresses only the first question presented:

After this Court decided *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), may an admiralty court exonerate defendants from all liability to a shipowner for the loss of its tanker when defendants conceded that their breaches of maritime duties imposing strict liability in tort and negligence were causes-in-fact of the vessel's stranding because the court found that the tanker's captain was grossly negligent in navigating the imperiled vessel?

*Amicus* respectfully submits that the court may not exonerate defendants in such a setting without consideration of the potential fault of all parties whose conduct caused or contributed the casualty pursuant to the comparative fault doctrine announced in *Reliable Transfer*, *supra*.

#### I.

#### THE COMPARATIVE FAULT DOCTRINE

In *United States v. Reliable Transfer Co., Inc.*, 421 U.S. 397 (1975), the Court adopted the rule of comparative fault in admiralty, holding that

when two or more parties have contributed by their fault to cause property damage in a marine

collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault . . .

*Reliable Transfer*, 421 U.S. at 411.

*Reliable Transfer* concerned the stranding of the Tanker MARY A. WHALEN when she navigated too close to Rockaway Point breakwater outside New York Harbor. More than half an hour before the casualty, the captain had observed that the flashing light, when had normally marked the southernmost point of the breakwater, was not operating. In subsequent maneuvers culminating in the grounding, the captain used only "his own guesswork judgment," without the assistance of the available lookout, chart, searchlight, radio-telephone and radar. *Id.* at 399. Wrongly believing the tanker's course would clear the breakwater, the captain steered a course too close to Rockaway Point, and the tanker grounded.

The trial court found the grounding was attributable 75% to the tanker's fault and 25% to the failure of the Coast Guard to maintain the light. Both the district court and the appellate court applied the existing divided damages rule, and the United States was held liable for one-half of the vessel's damages even though the Coast Guard was found only 25% at fault.

After granting certiorari, this Court acknowledged the traditional leadership role of the courts in "formulating flexible and fair remedies in the law maritime." *Reliable Transfer*, 421 U.S. at 409, and jettisoned the 120-year-old divided damages rule as "archaic," "unfair" and "unjust." *Id.* at 405-11.

The Court further noted that the inequities of the old rule were aggravated by the *Pennsylvania* rule when a party, guilty of even minor statutory fault, was held liable for half of the damages unless that party could satisfy the heavy burden of proving that its fault could not have contributed to the incident. *Reliable Transfer*, at 405, 406; *The PENNSYLVANIA*, 86 U.S. (19 Wall.) 125 (1874). The Court noted the development of the major-minor fault rule which attempted to avoid the inequities of the divided damages rule by holding a "grossly negligent" party solely responsible. However, the court found that this exception was "inherently unreliable [and] simply replace[d] one unfairness with another." *Reliable Transfer*, 411 U.S. at 406. Discounting arguments that the divided damages rule promoted settlements and reduced court congestion, the Court concluded that "the 'just and equitable' allocation of damages" could better be served under principles of comparative fault. *Id.* at 410, 411.

## II.

### THE FAIRNESS OF THE COMPARATIVE FAULT RULE

The comparative fault rule in admiralty has recently been reaffirmed by the Court in two separate settings. In *McDermott, Inc. v. AmClyde*, 511 U.S. \_\_\_, 114 S. Ct. 148 (1994), this Court recognized and relied upon the fundamental fairness of this doctrine in announcing the maritime rule for allocating responsibility among multiple parties, whose fault cause a marine casualty, after one of the parties has settled. After weighing policy considerations of judicial economy and promotion of settlements, the Court adopted the rule which allows a credit in favor

of the non-settling tortfeasors in proportion to the settler's comparative fault. The decision specifically acknowledged the proportional credit rule best complemented the equities achieved by the comparative fault doctrine. *McDermott*, 551 U.S. at \_\_\_, 114 S.Ct. at 1467-70.

More recently, the Court again acknowledged the underlying equity of the *Reliable Transfer* rule in *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, \_\_\_ U.S. \_\_\_, 115 S. Ct. 2091 (1995). There the Court considered a challenge that the imposition of prejudgment interest was unfair as to a party guilty of only minor fault. Upholding the traditional admiralty rule allowing for prejudgment interest in absence of peculiar circumstances, the Court commented that "any unfairness [of the prejudgment interest award] is illusory, because the relative fault of the parties has already been taken into consideration" by apportioning responsibility for the damages in respect of the fault of each party. *City of Milwaukee*, 115 S. Ct. at 2097.

Lower federal courts have likewise found the comparative fault doctrine adaptable to multiple situations<sup>2</sup> and useful in reaching fair results involving disparate issues arising from maritime casualties. 2 Thomas J. Schoenbam, *Admiralty and Maritime Law* (2d ed. 1994), § 14-4, pp. 270-73. Utilizing the doctrine's latitude, courts

<sup>2</sup> See, e.g. *Complaint of American Export Lines, Inc.*, 620 F. Supp. 490 (S.D.N.Y. 1985); *Seal Offshore, Inc. v. American Standard, Inc.*, 777 F.2d 1042 (5th Cir. 1985); *Sonat Marine, Inc. v. Belcher Oil Co.*, 629 F. Supp. 1319 (D.N.J. 1985), *aff'd* 787 F.2d 583 (3d Cir. 1986).



can avoid the inequities of "all or nothing" rulings premised upon rigid common law concepts such as "last clear chance" and active-passive indemnity. *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493 (5th Cir. 1982); *S. C. Loveland v. East-West Towing, Inc.*, 608 F.2d 160, 169, cert. denied sub nom. *St. Paul Mercury Ins. Co. v. East-West Towing, Inc.*, 446 U.S. 918 (1980), reh. denied, 611 F.2d 882 (1980), aff'g, 415 F. Supp. 596, 606-7 (S. D. Fla. 1976), cf. *Nunley v. M/V DAUNTLESS COLOCOTRONIS*, 727 F.2d 455, 466 (5th Cir. 1984) (en banc), cert. denied sub nom. *Dravo Mechling, Inc. v. Combi Lines*, 469 U.S. 832 (1984). These doctrines like the former major-minor fault exception to the divided damages rule were formulated to navigate around the harsh results compelled by rigid rules, which prohibited proportional contribution among joint tortfeasors or enforced contributory negligence as a complete bar to recovery. *Loose*, 670 F.2d at 500-502. However, with the advent of the comparative fault rule, the lower courts have been unshackled from inflexible rules<sup>3</sup> and now allocate responsibility for marine casualties in accord with the comparative faults of all contributing interests.

<sup>3</sup> As indicated by the late Circuit Judge Rubin in *Loose*, "concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party." *Loose*, 670 F.2d at 502.

### III.

#### THE INTERPLAY OF THE DEFENSE OF SUPERSEDING CAUSE WITH THE COMPARATIVE FAULT DOCTRINE

The question presented arises out of the interplay of the common law defense of superseding cause with the maritime comparative fault rule. The conflict of authorities concerning the application of this defense in admiralty has been outlined in the Ninth Circuit opinion below as well as the petition for certiorari.<sup>4</sup> *Amicus* does not contend that this defense is never applicable in admiralty. However, *Amicus* submits that the defense should be applied only in harmony with the equitable principles of the comparative fault doctrine. In particular, the trial court should examine the conduct of all parties and evaluate comparative fault of each so that the court can fairly and properly either allocate responsibility among the respective interests whose fault cause or contribute to a casualty or exonerate any party whose conduct or fault did not.<sup>5</sup>

<sup>4</sup> *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995); *Hercules, Inc. v. Stevens Shipping Co.*, 765 F.2d 1069, 1075 (11th Cir. 1985); *Lone Star Indus., Inc. v. Mays Towing Co.*, 927 F.2d 1453 (8th Cir. 1991); *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 497 (9th Cir. 1991); *Nunley v. M/V DAUNTLESS COLOCOTRONIS*, 727 F.2d 455, 466 (5th Cir. 1984) (en banc); see also, generally, Schoenbaum, *supra*, at Vol. 1, § 5-34, pp. 165-67; Note, *Abandon Ship? The Need To Maintain A Consistency Between Causation In Admiralty and Common Law Tort*; *Lone Star Industries, Inc. v. Mays Towing Co.*, 25 Creighton L. Rev. 1007 (1992).

<sup>5</sup> The trial court below seemed to acknowledge and partly agree with this requirement in its Bifurcation Order:



### A. The Decisions Below

During the Phase One trial, the trial court considered only the conduct of plaintiffs (navigation following breakout). Relying upon the common law concept of superseding cause, the trial court exonerated the defendants, finding that the "extraordinary negligence" of the plaintiffs was the sole proximate cause of the collision, but without considering the conduct of defendants or determining the nature or degree of their potential contributing fault. *Exxon Company, et al. v. Sofec, Inc., et al.*, Civ. No. 90-00271 HMF (May 20, 1994), Appendix D to Petition for Certiorari, App. 61-66.

In its affirmance, the Ninth Circuit indicated that the trial court had "assumed that the defendants' negligence was a cause in fact of the grounding." *Exxon Co. v. Sofec, Inc.*, 54 F.3d at 570, 575 (9th Cir. 1995). The Court further

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As discussed earlier, a determination of whether the master's alleged negligence is an intervening, superseding cause, which would cut off defendants' liability at the point of the intervening event, requires an examination of all the claimed causes of the casualty. See *Hunley v. Ace Maritime Corp.*, 927 F.2d 493, 1991 A.M.C. 1217 (9th Cir. 1991); *White v. Roper*, 901 F.2d 1501 (9th Cir. 1990).

Bifurcation Order, App. E to Petition for Certiorari, App. 82-83 (emphasis added). However, the court offered a different view following the Phase One trial when it concluded that "[d]etermining the causes of the breakout is not necessary to a determination of whether [plaintiff's] navigation was a superseding intervening cause of the stranding." *Exxon Company, et al. v. Sofec, Inc.*, Civ. No. 90-00271 HMF (May 20, 1994), Appendix D to Petition for Certiorari, App. 61-66, Conclusion of Law 43, App. 63.

noted that "if [the trial court] did not find [the] navigation after the breakout to be the sole proximate or superseding cause of the grounding, it could 'still determine in the first phase of the bifurcated trial the comparative fault (cause) of the grounding as between the breakout and the subsequent navigation<sup>6</sup> of the vessel'." *Exxon*, 54 F.3d at 575; see, Bifurcation Order, Appendix E to Petition for Certiorari, App. 82. Although no such determination was made, the Ninth Circuit affirmed the trial court judgment, upholding as not clearly erroneous the finding that the extraordinary negligence of the plaintiffs was the sole proximate and superseding cause of the grounding. *Exxon*, 54 F.3d at 576-79.

### B. The Nature Of The Superseding Cause Defense

The approach of the trial court, as affirmed by the Ninth Circuit, is inconsistent with the comparative analysis required under *Reliable Transfer*. It is likewise, *Amicus* submits, in conflict with the common law considerations necessary to establish the defense of superseding cause.

While the common law denominates this defense under the general concept of causation, it is not, at bottom, rooted in causation, but in considerations of fault. The defense of superseding cause has its bedrock in the judicial policy of determining when an initial actor may

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<sup>6</sup> This language seems to equate the events (breakout and navigation) with the conduct or culpability of the parties. While these events were certainly causes of the casualty, *Amicus* respectfully submits that the trial court should have examined the conduct and relative culpability of the parties involved in those events (breakout and navigation).

be exonerated from the liability for the consequences which its negligence has caused because of the operation of an intervening or subsequent cause.<sup>7</sup> See generally, W. Keaton, *et al.*, *Prosser and Keaton on Torts* § 44, pp. 301-19 (5th ed. 1984).

Common law premises this policy determination upon multiple factors involving the scope of the original actor's duty and fault and their interplay with subsequent causes and the ultimate harm. *Prosser & Keaton*, § 44; *Restatement (Second) on the Law of Torts*, § 440-444. For example, when the subsequent causes are "foreseeable" or "natural" following the original actor's neglect, the original actor is typically liable in spite of the subsequent cause.<sup>8</sup> *Prosser & Keaton*, § 44 at pp. 303-11, see also, *Restatement*, § 443, at 472 (1965).

<sup>7</sup> As described in *Prosser & Keaton*:

the problem is one of whether the defendant is to be held liable for an injury to which the defendant has in fact made a substantial contribution when it is brought about by a later cause of independent origin for which the defendant is not responsible. In its essence, however, it becomes again a question of the extent of the defendant's original obligation; and once more the problem is not primarily one of causation at all, since it does not arise until cause in fact is established. It is rather one of the policy as to imposing legal responsibility.

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It must be conceded that "intervening cause" is a highly unsatisfactory term, since we are dealing with problems of responsibility, and not physics.

*Prosser & Keaton*, § 44, pp. 301, 302.

<sup>8</sup> Once again, the legal terminology of "foreseeable" and "natural" does not quite coincide with everyday meaning or

The appellate and trial court opinions relied heavily upon the *Restatement* guidelines. *Restatement* § 442(a)-(e) delineates several important considerations in determining whether a subsequent cause (intervening force) constitutes a superseding cause which absolves the original actor from liability. These considerations include, *inter alia*, whether harm from the intervening force is different in kind from that which would have resulted from the original negligence; whether the "operation" or "consequences" of the intervening force are "extraordinary" or "normal" in view of the "circumstances existing"; and whether the intervening force operates independently of the situation created by the original actor's negligence. *Restatement*, § 442(a), (b), (c) at pp. 467, 468. As noted in the decisions below, Section 442(f) further suggests consideration of the "degree of culpability" of the subsequent actor which "sets the intervening force into motion."

These *Restatement* factors require an examination of the conduct of both original and later actors. A determination is needed as to the kind of harm anticipated

define the actual scope or limits of the initial actor's liability. As noted in *Prosser & Keaton*, "[i]t is perhaps a pointless quibble over the meaning of a term [foreseeable] to debate whether such normal intervening causes are to be called 'foreseeable.' They are at least foreseeable in the sense that any event which is not abnormal may reasonably be expected to occur now and then, and would be recognized as not highly unlikely if it did suggest itself to the actor's mind. They are closely and reasonably associated with the immediate consequences of the defendant's act and form a normal part of this aftermath and to that extent they are not foreign to the scope of the risk created by the original negligence." *Id.* at 306, 307.



from the fault of each, and the "circumstances existing" should be examined to determine whether the "operation" or "consequences" of the subsequent cause was "normal" or "extraordinary." *Id.* Restatement § 442B states that "[w]here the negligent conduct of the actor creates or increases the risk of a particular harm and is a substantial factor in causing that harm, the fact that the harm is brought about through the intervention of another force does not relieve the actor of liability, except where the harm is intentionally caused by a third person and is not within the scope of the risk created by the actor's conduct." Section 444 would further impose liability upon the original actor when the subsequent act is "a normal response to fear or emotional disturbance" brought about by the original actor's negligence.<sup>9</sup>

### C. Application Of Superseding Cause In Admiralty

This Court has long recognized the importance of the uniform maritime law. *The LOTTAWANA*, 88 U.S. (21 Wall.) 558, 575 (1875); *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216 (1917); *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 160 (1920). State laws and jurisprudence may not be applied in a fashion which would "contravene the essential purposes of, or to work material injury to, characteristic features of [the maritime] law or to interfere with

<sup>9</sup> This particular factor parallels a long-held principle in admiralty under which a navigator's error in judgment is held to be excusable when committed *in extremis*, that is, under the stress of the emergency created by another. *The BLUE JACKET*, 144 U.S. 371, 392 (1892); *The OREGON*, 158 U.S. 186, 204 (1895); John W. Griffin, *The American Law of Collision* § 233, pp. 529-32 (1949).

its proper harmony and uniformity in its international and interstate relations". *Knickerbocker, Inc.*, 253 U.S. at 160; see also, *Kossick v. United Fruit Co.*, 365 U.S. 731 (1961); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942); *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 631 (1959). In *Kermarec*, this Court refused to apply the different standards of care under common law for invitees and licensees to the claims of visitors injured aboard vessels. The Court explicitly declined to "import such conceptual distinctions [which] would be foreign to [maritime law's] traditions of simplicity and practicality." *Id.* at 631.

There is unquestionably inherent tension between the comparative fault rule and this common law defense. When the defense is premised upon the degree of fault of one party only, this conflict between the doctrines is most apparent. In particular, the inequities associated with the interplay of the *Pennsylvania* and major-minor fault rules, as noted in *Reliable Transfer*, 411 U.S. at 405, 406, arise with even greater force from the interplay of the *Pennsylvania* rule and the superseding cause defense, especially when the latter is premised upon the culpability of only one party. As applied by the courts below, this common law defense directly contravenes the "just and equitable" allocation of damages which was the explicit goal of *Reliable Transfer*. *Id.* at 411.

Acknowledging this tension, *Amicus* respectfully submits that this defense will only rarely<sup>10</sup> be applicable in

<sup>10</sup> As a practical matter, after *Reliable Transfer*, it is neither necessary nor desirable to apply the superseding cause doctrine



admiralty. When applicable, however, it must be applied in harmony with the equitable principles underlying the comparative fault doctrine. Of necessity, therefore, the trial court should always examine the conduct of all parties and the interplay of their conduct with the marine casualty before the court can either allocate liability on the basis of the comparative fault of the parties or exonerate any party under this common law defense. When thus applied in admiralty, this doctrine will be coordinated with the analysis of the comparative fault of all parties under *Reliable Transfer*.

Some courts have applied this defense appropriately.<sup>11</sup> The *en banc* decision of the Fifth Circuit in

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to most marine casualties. The comparative fault approach accommodates most factual circumstances in a fashion which allocates liability after weighing the relative duties of all parties, the nature and degree of their faults and the circumstances existing and acting upon them. For example, in *Reliable Transfer*, the liability was allocated between parties whose contributing faults were distinctly different in operation, nature and degree. The government's fault concerning condition of the breakwater light was very different in all respects from the captain's fault with respect to the navigation of the tanker. Indeed, the condition of the light did not create any emergency, and the captain was aware of that condition long before he negligently navigated the vessel. Acknowledging that *Reliable Transfer* did not consider defense of superseding cause, it is nonetheless obvious that this common law rule defense should be relegated to those rare circumstances where the nature, degree, operation and effect of the parties' fault are so disparate and remote that the chain of causation is effectively broken. Such a determination, however, can be made only after consideration of the conduct and fault of all parties.

<sup>11</sup> See, generally, Note, *Abandon Ship? The Need to Maintain a Consistency Between Causation In Admiralty and Common Law Tort:*

*Nunley v. M/V DAUNTLESS COLOCOTRONIS*, 727 F.2d 455 (5th Cir. 1984), reflects such an approach. The Fifth Circuit therein examined the application of this doctrine in a maritime casualty in the wake of *Reliable Transfer*. *Nunley* concerned the legal responsibility for a collision between the DAUNTLESS COLOCOTRONIS and a sunken wreck. The wreck had not been marked or removed by its owner or the United States. It was, however, contended that third parties ("upriver defendants") were responsible for the sinking of the wreck and were therefore liable for this collision, which occurred some three years after the sinking. The district court granted a judgment on the pleadings in favor of the upriver defendants on the grounds that pursuant to the Wreck Act, 33 U.S.C. § 409, the sole proximate cause of the collision was the failure to mark or remove the sunken wreck by the owner or the United States.

Examining the relationship between the superseding cause defense and the comparative fault doctrine, the Fifth Circuit held:

Should either the owner or the United States be held liable [for failing to mark or remove the wreck], however, their negligence cannot be regarded, *per se*, as superseding cause exonerating the negligent tortfeasors [upriver defendants] from any liability whatsoever for damages primarily resulting from their negligence, and under ordinary admiralty tort principles the causal initial negligence of the upriver defendants that contributed to the later accident should

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*Lone Star Industries, Inc. v. Mays Towing Co.*, 25 Creighton L. Rev. 1007 (1992).

make them liable for their apportioned share of the loss. See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 411, 95 S.Ct. 1708, 1715-16, 44 L.Ed.2d 251 (1975).

*Nunley*, 727 F.2d at 462 (emphasis supplied).

The Fifth Circuit analysis includes a full exposition of the common law considerations underpinning the superseding cause defense. *Nunley*, 727 F.2d at 463-66. Ultimately, the Court remanded the case for further proceedings during which the conduct of all parties would be evaluated in light of comparative fault principles under *Reliable Transfer* as well as the potential application of the superseding cause defense. *Id.* at p. 467.

The *Nunley* decision recognized the rare potential application of the superseding cause defense in harmony with the comparative fault analysis under *Reliable Transfer*.<sup>12</sup> It is noted that the decisions<sup>13</sup> cited by the Ninth Circuit, which applied this defense, did not suggest that the conduct and fault of the defendants need not be considered. Generally, the trial courts involved in those

<sup>12</sup> See also *Lone Star Industries, Inc. v. Mays Towing Co.*, 927 F.2d 1453 (8th Cir. 1991) and the superb analysis of Judge Friendly, involving similar considerations and conflicts under the former divided damages rule in *Petition of Kinsman Transit Co.*, 338 F.2d 708, 721-26 (2d Cir. 1964), cert. denied sub nom. *Continental Grain Co. v. Buffalo*, 380 U.S. 944 (1965).

<sup>13</sup> See note 4, *supra*. The Ninth Circuit also cited *Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646 (5th Cir. 1992) (reversing summary judgment premised upon the superseding cause defense) and the dicta in *Protectus Alpha Navigation Co. v. Northern Pac. Grain Growers*, 767 F.2d 1379, 1384 (9th Cir. 1985).

cases reviewed the conduct of all parties, and not just that of the final or subsequent actor.

In the decision below, the defendants were exonerated following the Phase One trial when the district court had examined only plaintiffs' conduct and evaluated the degree of only plaintiffs' culpability. The court made no examination, evaluation or finding concerning defendants' conduct or culpability. In premising its dismissal upon the degree of fault of the plaintiff only without considering the conduct of the defendants, the trial court manifestly violated the tenets of the comparative fault doctrine.<sup>14</sup>

*Amicus* respectfully submit that the application of the superseding cause doctrine in this fashion is irreconcilable with the comparative fault doctrine and directly contravenes the goal of a just and equitable allocation of damages of this uniform maritime rule.



<sup>14</sup> The decision directly conflicts with *Reliable Transfer*, effectively applying the extinct major-minor fault exception to the divided damages rule (i.e. gross negligence of one party absolves slight negligence of the other) following proceedings in which the defendants' conduct in causing this casualty was never proven to be less culpable than plaintiffs' conduct.

### CONCLUSION

For the foregoing reasons, *Amicus* respectfully submits that the judgments below should be vacated subject to further proceeds consistent with the comparative fault doctrine.

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